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The Administrative Tribunal of the International Labour Organization (ILO) is competent to hear complaints against:

International Labour Organization, including the International Training Centre
World Health Organization (WHO), including the Pan American Health Organization (PAHO)
International Telecommunication Union (ITU)
United Nations Educational, Scientific and Cultural Organization (UNESCO)
World Meteorological Organization (WMO)
Food and Agriculture Organization of the United Nations (FAO)
European Organization for Nuclear Research (CERN)
General Agreement on Tariffs and Trade (GATT)
International Atomic Energy Agency (IAEA)
World Intellectual Property Organization (WIPO)
European Organization for Safety of Air Navigation (Eurocontrol)
Universal Postal Union (UPU)
European Southern Observatory (ESO)
Intergovernmental Council of Copper-Exporting Countries (CIPEC)
European Free Trade Association (EFTA)
Inter-Parliamentary Union (IPU)
European Molecular Biology Laboratory (EMBL)
World Tourism Organization (WTO)
European Patent Organisation (EPO)
African Training and Research Centre in Administration for Development (CAFRAD)
Intergovernmental Organisation for International Carriage by Rail (OTIF)
International Center for the Registration of Serials (CIEPS)
International Office of Epizootics (OIE)
United Nations Industrial Development Organization (UNIDO)
International Criminal Police Organization (Interpol)
International Fund for Agricultural Development (IFAD)

International Union for the Protection of New Varieties of Plants (UPOV)
Customs Co-operation Council (CCC)
Court of Justice of the European Free Trade Association (EFTA Court)
Surveillance Authority of the European Free Trade Association (ESA)
International Service for National Agricultural Research (ISNAR)

Registry's translation,
the French text alone
being authoritative.

EIGHTY-THIRD SESSION

***In re* Eben-Moussi** **Judgment 1619**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Emmanuel Eben-Moussi against the World Health Organization (WHO) on 21 December 1995 and corrected on 20 February 1996, the WHO's reply of 30 October 1996, the complainant's rejoinder of 31 January 1997 and the Organization's surrejoinder of 11 April 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. This dispute has arisen from the facts on which the Tribunal ruled in Judgment 1376 (*in re* Mussnig) of 13 July 1994.

In a memorandum of 5 September 1994 to the Director of Personnel the complainant refuted accusations of sexual harassment brought by Mrs. Gabriele Mussnig, which were reported in the *Japan Times* of 6 August 1994, and asked the WHO to publish a denial. He wrote to the Director-General on 23 September asking "what arrangements the Organization [had] made to ensure his protection" and seeking his guidance in putting the record straight.

In November 1994 the WHO appointed an ad hoc grievance panel to investigate Mrs. Mussnig's accusations against the complainant. The panel submitted its report to the Director-General on 8 June 1995. It found that no sexual harassment had occurred and it recommended offering a written apology to the complainant and his family, making known the panel's findings to the press, particularly in Angola, and granting the complainant financial compensation.

The Director-General sent the complainant a copy of the report and in a covering letter of 10 July 1995 said that the Organization was sorry not to have told him of the accusations, offered him an apology on the Organization's behalf and said that the WHO's Legal Counsel would be in touch with his counsel to discuss compensation for the costs he had incurred. Attached to the letter was a statement by the Director-General in which he said that he "noted that there are significant contradictions between the Panel's conclusions and the allegation of sexual harassment, and that the Panel's findings could support the view that Dr. Eben-Moussi did not commit sexual harassment". Copies of the statement were sent to the foreign minister of Angola, the *Jornal de Angola* and the *Japan Times*.

The Organization's Legal Counsel and the complainant's counsel met several times and exchanged letters but failed to reach agreement.

By a letter of 29 September 1995 - the impugned decision - the Director-General informed the complainant's counsel that the Organisation had applied to the Tribunal for review of Judgment 1376 and that he rejected his client's claim to a large award of moral damages.

Judgment 1504 of 11 July 1996 dismissed the Organization's application for review of Judgment 1376.

B. The complainant has several pleas. He submits that when Mrs. Mussnig's complaint was before the Tribunal the WHO wilfully confined its reply to the issue of receivability, despite a "warning" from the Registrar. The reason was that for the sake of his "protégée" the Organization's Legal Counsel wished to avoid going into the merits. The WHO neither informed the complainant of the accusations against him nor challenged them. The Legal Counsel wrote a letter expressing doubts about the complainant's honesty and integrity.

When the complainant did happen to hear that the Tribunal had a case which involved accusations against him, the Organization failed to answer his letters.

Although the ad hoc grievance panel absolved him of guilt, the Director-General did not act on all its recommendations. He apologised for the procedure but refused to acknowledge the complainant's innocence.

Lastly, the WHO refused to pay him moral damages.

He seeks 500,000 United States dollars in moral damages and 10,000 Swiss francs in costs.

C. In its reply the Organization makes no bones about its failure to tell the complainant that he stood accused of sexual harassment in a complaint to the Tribunal. It observes that it has offered him an unqualified apology, both in private and in public, and does so again before the Tribunal.

It concedes that its former Legal Counsel, who later became head of the Director-General's office, ought to have consulted him before making some of his statements. But he failed to do so, not from bias or malice, but from a genuine wish to settle the dispute between the complainant and Mrs. Mussnig.

The defendant denies withholding information from him with malice aforethought: it was not expecting the Tribunal to "throw out" its objections to receivability or name him in Judgment 1376.

The reason for the delay in answering his correspondence was that at the time it had no official procedure for looking into charges of sexual harassment.

Lastly, it had no grounds in law for acting on the recommendations of an internal body when the Tribunal itself had made a different ruling.

D. In his rejoinder the complainant enlarges on his pleas and rebuts the Organization's arguments.

The WHO is, he says, using Judgment 1376 as a pretext: it knows full well that its handling of the case was wretched, and it wants the presumption of his guilt to stand on the strength of that judgment.

He was not a party to Mrs. Mussnig's complaint and had no inkling of her charges.

He raises to 12,000 francs the amount he is claiming in costs.

E. The Organization presses its pleas. It contends that the amount the complainant claims in damages is blatantly too large and disproportionate to the injury he is alleging.

CONSIDERATIONS

1. Judgment 1376 of 13 July 1994 set aside a decision by the Director-General of the WHO to renew the appointment of Mrs. Mussnig, ordered the Organization to reinstate her and awarded her damages. That judgment rested on the assumption, undisputed by the Organization at the time, that she had suffered sexual harassment by her supervisor, the complainant, and after spurning his advances was given poor performance reports which left her career in ruins.

2. The Organization thereupon set up an ad hoc grievance panel, in November 1994, to investigate Mrs. Mussnig's charges of sexual harassment. After lengthy hearings the panel submitted its report on 8 June 1995. It found that there had been no sexual harassment of Mrs. Mussnig by the complainant and that the Organization should make him a written apology and pay him financial compensation for the damage it had done to his good name by failing to submit full pleadings to the Tribunal. It had pleaded only that the complaint was irreceivable and it had offered no grounds for disputing Mrs. Mussnig's allegations.

3. On the strength of the panel's findings the Organization filed an application for review of Judgment 1376. The Tribunal dismissed the application by Judgment 1504 of 11 July 1996. It restated the exceptional grounds on which it would entertain such an application. It ruled that the panel's report was not to be deemed as a new fact warranting review since the Organization could quite well have refuted the charges in replying to Mrs. Mussnig's complaint, for example by asking Dr. Eben-Moussi to give his own version. It concluded:

> "If it failed to approach Dr. Eben-Moussi it must bear responsibility for such failure. As far as the complainant is concerned, she succeeded in her claim on the evidence as presented to the Tribunal. It would be sheer negation of justice to reopen the case as the Organization now asks."

4. That judgment was the final ruling on the dispute that Mrs. Mussnig had with the WHO. But the complainant is arguing that the Organization has caused him injury by failing to defend his good name and he is ask-ing the Tribunal to award him 500,000 United States dollars in moral damages.

5. The two earlier judgments are final and binding and call for no further comment. Yet the Organization is not denying that it was wrong not

to produce at the time any evidence that would have tended either to corroborate or to refute the charges against the complainant. The Director-General's public statement was explicit:

> "I also note that WHO failed to inform Dr Eben-Moussi of the allegation of sexual harassment that had been made against him, and to give him a timely opportunity to respond. The Organization offers Dr Eben-Moussi its unequivocal apology for this failure, and for any resulting damage to his reputation."

In its pleadings in reply to the present complaint the Organization repeats that it has apologised to him in private and in public and does so again before the Tribunal.

6. When a staff member makes charges as serious as sexual harassment an organisation must do its utmost to afford protection. But it must at the same time carry out a full and proper inquiry that respects the rights of the accused. Here the WHO obviously failed to do so. Instead it originally preferred to let the Tribunal rule without adducing evidence that might have proved material. It thereby erred, and the complainant is entitled to redress on that account.

7. As the Organization submits, the complainant has sustained no injury to his career from Mrs. Mussnig's winning her case. The only damages he is entitled to are for the moral injury, and the Tribunal sets the amount *ex aequo et bono* at 10,000 United States dollars.

8. He is also awarded 5,000 Swiss francs in costs.

DECISION

For the above reasons,

1. The Organization shall pay the complainant 10,000 United States dollars in moral damages.
2. It shall pay him 5,000 Swiss francs in costs.
3. His other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

WILLIAM DOUGLAS MICHEL GENTOT MELLA CARROLL

A.B. GARDNER

EIGHTY-THIRD SESSION

_In re_ Moreno de Gómez (No. 2) **Judgment 1620**
(Application for execution)

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by Mrs. Yocasta Moreno de Gómez on 29 October 1996 for the execution of Judgment 1553, the reply of 12 December 1996 from the United Nations Educational, Scientific and Cultural Organization (UNESCO), the complainant's rejoinder of 24 March 1997 and the Organization's surrejoinder of 7 May 1997;

Considering Articles II, paragraph 5, VI and XII of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. In Judgment 1553, delivered on 11 July 1996 on the first complaint of Mrs. Moreno de Gómez, the Tribunal ordered:

> "1. The Organization's decisions of 29 December 1992, 25 July 1994 and 10 November 1994 are quashed.
>
> 2. The Organization shall either, within sixty days of the date of publication of this judgment:
>
>   (a) reinstate the complainant at her former grade as from 1 February 1993 and up to the date of this judgment;
>
>   (b) pay her salary, allowances and any other benefits accordingly, less any indemnities she may have received on termination;
>
>   (c) pay her interest on all arrears at the rate of 10 per cent a year as from the dates at which they fell due; and
>
>   (d) grant her a contract of appointment for a period of two years from the date of this judgment at the same grade and in a post matching her qualifications and experience;

or failing that

(a) pay her damages in an amount equivalent to her salary and allowances for four years and six months at the rates prevailing at 31 January 1993, less any indemnities she may have received on termination; and

(b) pay her interest on the net amount at the rate of 10 per cent a year as from 20 December 1994, the date of correction of her complaint, up to the date of payment.

3. The Organization shall pay the complainant a total of 500,000 French francs for material and moral injury.
4. It shall pay her 50,000 French francs in costs.
5. Her other claims are dismissed."

2. On 6 August 1996 the Organization paid to the complainant 550,000 French francs in satisfaction of the awards in points 3 and 4 of that ruling.

3. By a letter dated 16 August 1996 the Director-General applied to the Tribunal for review of Judgment 1553 and the rulings contained therein.

4. The complainant filed this application on 29 October 1996 seeking the execution of point 2 of those rulings, damages for failure to execute it and damages for the exceptionally grave material and moral injury she had suffered by reason of the deliberately delayed execution of points 3 and 4. She also asks for costs.

5. In its reply the Organization denies delay in executing points 3 and 4, payment of the sums ordered having been made less than a month after the delivery of the judgment.

6. The complainant's claim to damages for delay in paying the sums ordered in points 3 and 4 must fail because payment was made within a reasonable time.

7. In regard to point 2 the Organization submits that its application for review had the effect of suspending the execution of the judgment. The plea is unfounded. Article VI of the Tribunal's Statute states that its judgments are "final and without appeal". There is no provision in its Statute or Rules for any stay in the execution of a judgment. As the Tribunal held in Judgment 82 *(in re* Lindsey), even if there were referral under Article XII of the Statute to the International Court of Justice, "the immediately operative character" of the Tribunal's judgment would not be affected.

8. In Judgment 1602 of 30 January 1997 the Tribunal summarily dismissed the Organization's application for review because it disclosed no valid grounds.

9. In its surrejoinder dated 7 May 1997 the Organization admits that, with the dismissal of its application for review, it has no alternative but to execute Judgment 1553. It says that it will take all the measures required by the judgment, but that the calculation of the amounts due to the complainant is particularly complex and it needs time to ensure proper precision, especially because of her debts to its Savings and Loan Service.

10. In point 2 of its ruling the Tribunal allowed sixty days for the Organization to decide whether to reinstate the complainant or pay her damages. There is nothing in the evidence to indicate that the period of sixty days was too short. The complainant is therefore entitled to damages for the Organization's delay since 10 September 1996 in executing point 2. The Tribunal will award her 50,000 French francs under this head. It also awards her 10,000 French francs in costs. Furthermore, if the Organization fails to execute point 2 or to pay the complainant those two amounts within thirty days of the date of delivery of the present judgment, it shall pay her a penalty of 25,000 French francs for each further month of delay.

DECISION

For the above reasons,

1. The Organization shall pay the complainant damages in the sum of 50,000 French francs for its failure to execute point 2 of the ruling in Judgment 1553.
2. It shall pay her 10,000 French francs in costs.
3. If the Organization fails to execute point 2 of the ruling in Judgment 1553 or to pay her those two amounts within thirty days of the date of delivery of this judgment, it shall pay her a penalty of 25,000 French francs for each further month of delay.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

Wm Douglas

WILLIAM DOUGLAS

E. RAZAFINDRALAMBO

EGLI

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
* GENEVA *

EIGHTY-THIRD SESSION

***In re* Skerhut** **Judgment 1621**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Rudolf Friedhelm Skerhut against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 21 May 1996 and corrected on 24 June, Eurocontrol's reply of 27 September, the complainant's rejoinder of 10 December 1996 and the Organisation's surrejoinder of 7 March 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a German, is on the staff of Eurocontrol's software team at Karlsruhe. His daughter is covered under the Agency's Sickness Fund. On 19 January 1995 a dentist sent him a bill for filling her teeth and he claimed reimbursement from the Fund. On 3 August 1995 it paid him the maximum allowable amount — 588.34 German marks — for "normal" fillings under Annex III.A of Rule of Application No. 10 concerning sickness insurance cover. On 30 October he lodged a "complaint" under Article 92(2) of the Staff Regulations claiming 80 per cent of the cost of the treatment, or another 377.18 marks. On 21 November the Management Committee of the Sickness Fund took up his case and recommended rejection. By a letter of 21 February 1996 the Director of Human Resources endorsed the Committee's recommendation on the Director General's behalf. That is the decision he is challenging.

B. The complainant submits that Eurocontrol is wrong to regard the fillings as "normal". Under the terms of Annex III.A to Rule 10 it should have reimbursed him "at the rate of 80% after consultation of the Dental Adviser".

He wants the Tribunal to quash the impugned decision, order Eurocontrol to refund the treatment at the rate of 80 per cent and award him 4,000 Belgian francs in costs.

C. Eurocontrol contends that the complaint is devoid of merit. In keeping with the applicable rules it decided to refund the complainant at the rate for normal fillings, as the dental adviser had recommended.

D. In his rejoinder the complainant challenges several points in the reply, enlarges on his pleas and presses his claims.

E. In its surrejoinder the Agency maintains that it did not break any applicable rule or general principle. It supplies a report from a dental adviser of the Sickness Insurance Scheme of the European Union institutions confirming that the fillings in question could be classed as "normal".

CONSIDERATIONS

1. Eurocontrol employs the complainant as an expert in its software team at Karlsruhe.

2. Annex III.A of Rule of Application No. 10 concerning sickness insurance cover provides for reimbursement of 80 per cent of the cost of the following items of dental treatment up to the maximum stated in Belgian francs:

"Normal filling	BEF 1,200
Filling with devitalisation of one root	BEF 1,600
Filling with devitalisation of more than one root	BEF 2,400
Normal extraction	BEF 800
Surgical extraction	BEF 1,600
Extraction of impacted tooth	BEF 2,900
Apectomy	BEF 2,400
Gingivectomy	BEF 1,600
Full scaling and polishing	BEF 640
X-ray of a single tooth	BEF 512
General X-ray	BEF 1,600"

The text adds:

> "Treatment not listed above shall be reimbursed at the rate of 80% after consultation of the Dental Adviser."

3. The complainant claimed the reimbursement of 80 per cent of the cost of the dental treatment of his daughter. In regard to the cost of several fillings Eurocontrol paid him only the maximum rate specified for "normal" fillings.

4. The complainant submitted an internal "complaint" to the Director-General, who referred it to the Management Committee of the Fund for its opinion. He contended that those fillings had not been "normal" ones and, as they had not involved "devitalisation" of a root, had constituted treatment falling within the residual category, for which reimbursement was due at the rate of 80 per cent.

5. The Committee consulted the Fund's dental adviser, who expressed the view that a "normal" filling included any that did not involve devitalisation of a root, whatever the size of the filling or the complexity of the treatment.

6. The Committee held that Rule No. 10 had been correctly applied and it advised rejecting the "complaint". The Director-General rejected it, and that is the impugned decision.

7. The Tribunal agrees with the Committee's interpretation.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Mark Fernando, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

Wm Douglas

WILLIAM DOUGLAS

MARK FERNANDO

JULIO BARBERIS

AB Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-THIRD SESSION

In re van der Peet (No. 21) **Judgment 1622**

THE ADMINISTRATIVE TRIBUNAL,

Considering the twenty-first complaint filed by Mr. Hendricus van der Peet against the European Patent Organisation (EPO) on 2 September 1996, the EPO's reply of 27 November 1996, the complainant's rejoinder of 20 February 1997 and the Organisation's surrejoinder of 11 April 1977;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to allow the complainant's application for the hearing of witnesses;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Dutchman, is on the staff of the EPO's secretariat, the European Patent Office, in Munich. Facts relevant to this case appear under A in Judgments 1391 and 1439 on his eighteenth and nineteenth complaints.

In a letter of 27 February 1995 the Director of Personnel Administration told him that he was promoted to grade A4 as from 1 July 1993. By a letter of 1 March 1995 he asked the Director to give effect to his promotion "in keeping with the actual standards applied to such promotions" or else treat his letter as an internal appeal. By a letter of 26 April the Director of Staff Policy told him that the President of the Office had put the matter to the Internal Appeals Committee. In a report dated 17 April 1996 the Committee recommended rejection. By a letter of 5 June 1996 the Director of Staff Policy told him that the President had decided to endorse the recommendation. That is the decision under challenge.

B. The complainant submits that he met the required conditions well before his promotion took effect. He alleges breach of the EPO's practice governing promotion, failure to take account of the facts, and flaws in the proceedings before the Appeals Committee.

He is seeking promotion from either 1 January 1991 or 1 July 1991 or, subsidiarily, from either 1 January 1992 or 1 July 1992. He claims 4,000 German marks in costs.

C. The Organisation replies that the complaint is time-barred: not until August 1993 did he first challenge the denial of promotion. He had ample opportunity before that to ask why his name was not on the list of officials who did get promotion in 1991 and 1992. In subsidiary argument on the merits the EPO contends that it gave effect to his promotion at the proper date. It describes the complaint as an "affront" to its dignity and an abuse of process.

D. In his rejoinder the complainant seeks to counter the EPO's pleas on receivability and the merits.

E. In its surrejoinder the EPO observes that the rejoinder contains no new pleas to make it change its position.

CONSIDERATIONS

1. The complainant joined the staff of the European Patent Organisation in 1980 as a patent examiner. This complaint, his twenty-first, is a sequel to his eighteenth and nineteenth. Judgments 1391 and 1439 set out the main facts.

2. On 9 March 1992 the EPO imposed on the complainant a disciplinary measure that consisted in reducing his seniority by twelve months. That decision was set aside by Judgment 1391, allowing his eighteenth complaint.

3. While those proceedings were pending the complainant found that his name was not on the list of promotions of staff from A3 to A4 that the Office had published on 11 August 1993. By a letter dated 19 August 1993 he asked the President of the Office to say why, and the answer was that the reason was the disciplinary measure. After exhausting his internal remedies he filed his nineteenth complaint on 11 August 1994 seeking promotion to grade A4 as from "the date on which the Promotion Board recommended such promotion". Judgment 1391 was delivered on 1 February 1995, and by

a letter dated 27 February the EPO promoted the complainant to A4 as from 1 July 1993.

4. The complainant put a further claim to the EPO at once, on 1 March 1995, that his promotion should be backdated to 1 January or 1 July 1991 or, failing that, to 1 January or 1 July 1992. It is the rejection of the claim that prompts this complaint.

5. On 6 July 1995 the Tribunal delivered Judgment 1439 on his nineteenth complaint. It noted that, although he had not specified the date recommended by the Promotion Board for his promotion, what he had asked for in his letter of 19 August 1993 was promotion to A4 in 1993. It concluded that he had received full satisfaction if the date of promotion recommended by the Promotion Board was 1 July 1993 or later and that any claim to backdating as from any earlier date must await the outcome of his internal appeal pursuant to his claim of 1 March 1995.

6. In its report of 17 April 1996 on that appeal the Appeals Committee confirmed that the date that the 1993 Promotion Board had recommended was 1 July 1993. The complainant does not dispute that, and in accordance with Judgment 1439 his claim to promotion in 1993 has been satisfied in full.

7. As for his claim to the backdating of his promotion to 1991 or 1992, it is not in dispute that his promotion to A4 depended on whether his performance had been "outstanding", "very good" or "good": the higher the rating, the lower the minimum age and the less the "reckonable experience" required to qualify for promotion. In his claim of 1 March 1995 he said that the practice was to grant promotion to A4 on the strength of 17 years' reckonable experience — the EPO says 15 to 18 years — and "very good" ratings for four years; and that by 1 July 1991 he had the 17 years' reckonable experience — the EPO says he had only 16 — and had had "very good" ratings for two-and-a-half years, a point the EPO admits.

8. Although the complainant may have otherwise qualified, even as late as 1 July 1992 he had not yet had four "very good" ratings and he therefore failed to qualify for promotion in terms of the prevailing practice.

9. He has cited an instance of promotion of a staff member in 1992 whom the Promotion Board had not recommended and who had had "very good" ratings for less than two-and-a-half years. He contends that that was in keeping with the criteria for promotion in 1992 and that he had satisfied those criteria even in 1991. The Tribunal ruled on the matter in

Judgment 1600 (*in re* Blimetsrieder and others); it held that the decision to promote the other staff member he mentions had been contrary to the established procedure for promotion and had resulted in the denial of equal treatment. The reason why it did not quash that promotion was that the complainants had not so asked.

10. As the complaint fails on the merits, it is unnecessary to consider its receivability.

11. In his submissions the complainant has made personal allegations against two senior officers of the EPO which have not the slightest relevance to the vindication of his rights or to the present litigation. He has thereby misused the rights and privileges he enjoys in proceedings before the Tribunal.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Mark Fernando, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

W Douglas

WILLIAM DOUGLAS

MARK FERNANDO

JULIO BARBERIS

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail *Tribunal administratif*	International Labour Organization *Administrative Tribunal*

Registry's translation,
the French text alone
being authoritative.

EIGHTY-THIRD SESSION

***In re* Alders-Meewis (No. 2)**
and van der Peet (No. 20)

Judgment 1623

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs. Adriana Alders-Meewis and the twentieth complaint filed by Mr. Hendricus van der Peet against the European Patent Organisation (EPO) on 2 May 1996, the EPO's single reply of 24 July 1996, the complainants' rejoinder of 3 January 1997 and the Organisation's surrejoinder of 7 February 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainants, who are Dutch and live in Germany, are permanent employees of the EPO's secretariat, the European Patent Office. According to Article 16 of the Protocol on Privileges and Immunities of the EPO the "salaries and emoluments" of its staff are exempt from national income tax. Both complainants pay German tax on income from other sources at a rate that takes account of their pay at the EPO.

On 10 November 1994 a tax tribunal in Munich dismissed an appeal from Mrs. Alders-Meewis against the application of that rate to her husband's income. Without going to court Mr. van der Peet has addressed a protest to the competent tax authority in Germany. By letters of 27 March 1995 the complainants asked the President of the Office under Article 28(1) of the Service Regulations for "technical and financial assistance" from the Organisation in challenging the German tax rates in court and, failing that, to treat their letters as internal appeals.

By letters of 11 May 1995 the Administration told them that the President had put their case to the Internal Appeals Committee. In its report of

11 December 1995 the Committee recommended rejection. By letters of 7 February 1996 the Director of Staff Policy told them that the President had endorsed the Committee's recommendation. Those are the impugned decisions.

B. The complainants submit that the Organisation had a duty under Article 28 to help them to counter a policy that offended against the provision on tax exemption in the Protocol on Privileges and Immunities. They plead breach of equal treatment and charge the Appeals Committee with partiality.

They seek awards of damages for "illegally levied" taxes and of costs, plus interest at the rate of 15 per cent a year. They claim technical and financial help in resisting in the competent courts further levies of tax reckoned in the same way.

C. In its reply the EPO contends that the complaints are irreceivable. The one from Mrs. Alders-Meewis is time-barred and neither hers nor Mr. van der Peet's indicates what "specific procedure" they might follow. But to forestall other complaints of this kind the Organisation wants the Tribunal to rule on the merits.

The complaints are devoid of merit. Even if Article 28 did apply, and it does not, there would be no reason to "assist" the complainants. Article 16(1) of the Protocol expressly allows tax authorities to "take into account the salaries and emoluments thus exempt when assessing the amount of tax to be applied to income from other sources". There was no breach of equal treatment and the charge of impartiality is groundless.

D. In their rejoinder the complainants argue that their complaints are receivable and well-founded. They claim awards of "punitive" damages in the amount of one German mark each for breach of the duty of care that the EPO owes them.

E. In its surrejoinder the Organisation maintains its pleas in the reply and comments on several points raised in the rejoinder.

CONSIDERATIONS

1. The complainants, who are officials of the European Patent Office in Munich, object to the reckoning by the German Government of rates of tax on income they have from sources other than the EPO. Although their pay at the EPO is exempt from income tax under Article 16(1) of the

Protocol on Privileges and Immunities of the European Patent Organisation, such income is taken into account in determining the rate at which outside income is taxed. Because tax is determined according to a graduated scale the amount they must pay is the greater.

2. The tax authorities and courts of the host country having rejected their objections, they submitted claims to the President of the Office on 27 March 1995. They asked him for technical and financial help from the Organisation in getting the competent courts to recognise their right to have their taxes reckoned in keeping with their privileges and immunities under the Protocol. They also claimed awards of damages for the taxes they alleged had been unlawfully levied and for the fees they had paid to their tax advisers. The President referred their appeals to the Internal Appeals Committee. On 11 December 1995 the Committee unanimously recommended rejecting them. On 7 February 1996 the complainants were sent notice of the President's acceptance of the Committee's recommendation. Those are the decisions they want the Tribunal to quash and the two complaints may be joined to form the subject of a single judgment.

3. Though the EPO regards them as irreceivable, it does not press the plea, being anxious to avert further pointless litigation. Since they are in any event devoid of merit there is no need to rule on receivability.

4. Before taking up the pleas on the merits the Tribunal will dispose of several procedural issues. One is the complainants' application for the hearing of an expert witness on international tax law and of the chairman of the Appeals Committee. The Tribunal sees no need to hear those witnesses. Nor does it allow the complainants' challenge to the impartiality of the chairman and other members of the Committee. Neither the Committee's membership nor the proceedings before it bear out in any way the complainants' charges. The EPO expresses "surprise", too, at the complainants' getting hold of an internal memorandum that ought to have been kept confidential and of personal information about other officials. The Tribunal will not, however, order the complainants to give any explanation, and there is no reason under the circumstances to strike the memorandum from the record.

5. The complainants' first plea on the merits is that the Organisation should "assist" them in their dispute with the German tax authorities. They rely on Article 28(1) of the Office's Service Regulations, which reads:

> "If, by reason of his office or duties, any permanent employee, or former permanent employee, or any member of his family living in his household is subject to any insult, threat, defamation or attack to his person or property, the Organisation shall assist the employee, in particular in proceedings against the author of any such act."

The duty of care that that provision lays on the Organisation does not cover a case like that of the complainants, who are challenging municipal law that is neither a "threat" nor an "attack" on their "person or property" and which in any event does not affect them "by reason of [their] office or duties". Even if, as the words "in particular" suggest, the terms of the provision are not exhaustive, it would be a travesty of the duty of protection to extend it to staff grievances about the application of municipal law.

6. An international organisation must of course see to it that the contracting parties observe the privileges and immunities that the conventions they adhere to bestow on its staff. But here the complainants are mistaken: Article 16 of the Protocol on Privileges and Immunities is quite explicit about the duties of contracting States. It declares salaries and emoluments exempt from national income tax and goes on to say that the "Contracting States may, however, take into account the salaries and emoluments thus exempt when assessing the amount of tax to be applied to income from other sources". So the Protocol offers a choice and the German Government commits no breach of 16(1) in taking account of pay at the EPO for the purpose of reckoning rates of tax owed by EPO staff, provided it does not actually levy tax on that pay. That the Austrian Government has not used the option and has signed an agreement that takes a more benign view of the tax exemption of the EPO staff in Vienna is neither here nor there: the German Government is still free to exercise the option that Article 16 offers it.

7. The conclusion is that the complainants' claims to the quashing of the impugned decisions and to compensation cannot but fail, and so do their claims in their rejoinder to awards of "punitive" damages.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

WILLIAM DOUGLAS MICHEL GENTOT MARK FERNANDO

A.B. GARDNER

EIGHTY-THIRD SESSION

_In re_ Clements **Judgment 1624**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Penelope Jane Margaret Clements against the World Health Organization (WHO) on 21 June 1996, the WHO's reply of 23 September, the complainant's rejoinder of 3 December 1996 and the Organization's surrejoinder of 7 March 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who is British, joined the staff of the WHO in October 1976 as a clerk-typist/clerk-stenographer at grade G.2. Having resigned in May 1980, she came back in November 1982 under a short-term appointment as a secretary at grade G.4. In June 1983 she got the first of several fixed-term appointments. She was promoted to G.5 the following year. In January 1991 she took up new duties as a secretary in the Global Programme on AIDS (GPA), still at G.5. In February 1994 the Organization put her on another secretarial post — No. 1.3856 — at the same grade and also under the AIDS Programme. In form 172 "Notification of decision on position request", which the chief of Budget signed on 22 August 1991, the Administration had described post 1.3856 as "indefinite, subject to continued need and availability of funds".

In a letter dated 26 September 1995 a senior officer of the Division of Personnel told her that the Organization had decided to terminate her appointment under Staff Rule 1050.1 at 31 December 1995, when her post was "scheduled for abolition" for want of funding. On 8 November 1995 she gave the headquarters Board of Appeal notice of appeal against termination.

By a letter of 19 March 1996 an Assistant Director-General informed the chairman of the Staff Committee that the Director-General was willing to give former staff of the Programme leave to go directly to the Tribunal. On 28 May 1996 the complainant told the headquarters Board that she was withdrawing her appeal.

B. The complainant submits that the decision to terminate her appointment was unlawful. She alleges breach of formal requirements about notice of termination in the WHO Manual and failure to carry out the "reduction-in-force procedure" required under Staff Rule 1050.2, which is about termination due to abolition of a post of indefinite duration.

She seeks the quashing of the notice of termination in the letter of 26 September 1995 and reinstatement as from 1 January 1996 with payment, plus interest, of all entitlements due from that date less any occupational earnings she may have had up to the actual date of reinstatement. She claims 4,000 Swiss francs in costs.

C. In its reply the WHO says that it treated her fairly and in full compliance with the rules. The Manual provision she relies on does not apply to her case. Nor was she entitled to a reduction-in-force procedure under Rule 1050.2: her post being one of limited, not indefinite, duration, the material rule is 1050.1. In any event the Organization did its utmost to find other employment for her. If the Tribunal ruled in her favour, the application of the reduction-in-force procedure would be a more appropriate remedy than reinstatement.

D. In her rejoinder the complainant rebuts the Organization's pleas and enlarges on her own. She presses her claims.

E. In its surrejoinder the WHO maintains that it met the "essential" requirements of the material provisions in the Manual and that there was no call to apply the reduction-in-force procedure to the complainant's case.

CONSIDERATIONS

1. The WHO employed the complainant under a series of contracts from 1976 to 1980. She joined the Organization again in November 1982. As from June 1983 it employed her under two-year contracts on regular

budget posts until 1991. It then gave her a five-year contract that was to expire at 30 June 1996. As from 7 February 1994 it transferred her to post No. 1.3856 at grade G.5 under its Global Programme on AIDS (GPA). That post had been established on 22 August 1991 as "indefinite, subject to continued need and availability of funds" according to form 172 ("Notification of decision on position request"). By a letter dated 26 September 1995 the chief of Contract Administration and Information, in the Division of Personnel, informed her that funding for her post would cease, and the post itself would be abolished, at 31 December 1995 and that her appointment would terminate at that date in accordance with Staff Rule 1050.1. That rule reads:

> "The temporary appointment of a staff member engaged for a post of limited duration may be terminated prior to its expiration date if that post is abolished."

On 8 November 1995 the complainant gave notice of appeal against the decision to terminate her appointment and by agreement between the parties the case has been submitted directly to the Tribunal.

2. The background to the dispute is that, after discussion with other international bodies that were to offer sponsorship, the Economic and Social Council of the United Nations adopted in July 1994 resolution 1994/24 approving the establishment of a joint and co-sponsored United Nations programme on HIV/AIDS (UNAIDS). In May 1995 the 48th World Health Assembly adopted a resolution of its own in which it endorsed the establishment of UNAIDS — "to which WHO will provide the administrative framework" — and asked the Director-General to "arrange for WHO to meet the administrative needs of the Programme once it is operational, in the light of the Organization's role as administering agency". The new Programme was to become "operational" by 1 January 1996.

3. By a memorandum of 6 March 1995 the Executive Director of the GPA informed all its staff at headquarters that it would cease to exist at 31 December 1995 and that the Division of Personnel would in due course be giving advice on each staff member's contractual position. He encouraged all the staff to apply for positions in UNAIDS and for suitable vacancies in the Organization. On 1 June 1995 the Director of the Division of Personnel forwarded to the Organization's senior officers a "List of GPA/WHO Professional staff available for reassignment" — there were 87 — together with a one-page curriculum vitae for each of them. On 20 June

1995 he forwarded to the Legal Counsel a "List of GPA/WHO General Service staff available for reassignment", of whom there were 35 and for each of whom he again appended a one-page curriculum vitae.

4. The closure of GPA led to the displacement of 242 staff, of whom 131 were at headquarters. To make matters worse, it came at a time when, as a result of acceptance of "zero growth" in the Organization's regular budget, 167 of its posts, some of which were vacant, had to be abolished anyway.

5. Notwithstanding the difficulties the Organization made efforts to reassign staff, to arrange for early retirement and mutually-agreed separation in suitable cases and to obtain employment elsewhere for the GPA staff. But it still had to carry out a "reduction-in-force" exercise for 27 staff who in its opinion held posts of indefinite duration or who had career service appointments. It granted all former GPA staff a terminal indemnity equivalent to at least three months' pay whether or not they were so entitled under the Staff Rules.

6. There are two grounds of complaint:

(a) breach of the provisions governing notice of termination of appointment; and

(b) breach of the procedural requirements applicable in the event of termination on account of abolition of post.

The Tribunal will take up (b) first.

The duration of the complainant's post

7. The fundamental issue in this case is whether the post which the complainant occupied was of indefinite duration, as she contends, or of limited duration, as the Organization maintains. The Tribunal has already had occasion to determine whether a post is of indefinite or limited duration: see, for example, Judgments 470 (*in re* Perrone), 515 (*in re* Vargas), 891 (*in re* Morris) and 974 (*in re* Birendar Singh). In considering that issue a distinction must be drawn between the duration of the post and the duration of the appointment of the incumbent. It is a distinction that the Tribunal drew in Judgment 974.

8. The WHO argues that the reasoning in those judgments has ceased to apply because Staff Rule 1050.6 was amended as from 1 January 1989 to lay down definitions of duration. It now reads:

> "Posts of indefinite duration comprise those that continue in existence unless and until an express decision is taken to abolish them. Posts of limited duration automatically lapse at the end of the period for which they were established unless an express decision is taken to continue them. The Director-General shall determine the categories of posts falling within each of the above two definitions."

9. Other material rules include Manual paragraph II.9.260, which came into force on 20 September 1989 and which reads:

> "Reduction-in-force provisions do not apply to posts of limited duration: incumbents of such posts are not affected by these provisions and cannot benefit from them. Posts of limited duration automatically lapse at the end of the period for which they were established unless an express decision is taken to continue them. This period is specified in the relevant authorized position lists or programme budget proposals and also in vacancy notices and post descriptions. Posts of limited duration include:
>
> 260.1 posts financed from non-regular budget funds located either at Headquarters or at a regional office;
>
> 260.2 inter-regional or inter-country project posts;
>
> 260.3 country project posts, irrespective of the source of funds;
>
> 260.4 posts financed from the regular budget that have been expressly established for a specific period."

10. The procedure for the establishment and abolition of posts is set out in Section III.3 of the Manual. That provision has undergone many amendments since 1985; thus until 1991 a request for the establishment of a post had to be addressed to the Director of Personnel, and over the years some departments have changed names: for example, the Office of Administrative Management and Evaluation has become the Office of Staff and Management Development. But the basic procedure remains the same. The version dated 15 April 1991 of Section III.3 provides in paragraph 40:

> "Requests for the establishment or abolition of posts are addressed to Chief Budget in the first instance for review and advice as to availability of funding. The requests are then sent to the Director of Personnel who makes a preliminary review and transmits the request to the Office of Administrative Management and Evaluation for review and analysis. Administrative Management and Evaluation, if this appears necessary, obtains the observations of appropriate units at headquarters. Budget is responsible for consolidating the comments into a proposal for presentation together with the request to the Director-General and for notifying those concerned of the Director-General's decision."

The request is to be entered in form 171 ("Authorized position request") and a description of the post to be attached on form 81 ("Post description").

Again according to Section III.3, the Budget unit reviews the request so as to determine:

> "90.1 the date from which the post could be covered;
> 90.2 the funding during the current financial period;
> 90.3 the effect on subsequent financial periods and on the budget;
> 90.4 any other implications resulting from the establishment of the post."

Lastly, the same section states in paragraph 130:

> "The Director-General takes a decision on the request and returns the documents to Budget. The decision and any significant comments or recommendations, including the effective date if the request is approved, are conveyed by Budget on form WHO 172, Notification of Decision on Position Request, to the originator of the request, with a copy to Personnel."

11. The Organization submits that the category in which the complainant's post fell is to be determined solely by reference to Rule 1050.6 (see 8 above) and to Manual paragraph II.9.260 (see 9 above). Though acknowledging that neither vacancy notice nor post description contained any statement about the duration of the post, it argues that "no Organizational 'state of mind' can be inferred from the absence of information on these forms". It concedes that form 172 may describe some posts as "indefinite, subject to continued need and availability of funds" and others as "time-limited posts for period of two years from date of recruitment, extension of post subject to continued need and availability of funds". But — it argues — that form is "not the fundamental document that establishes whether a staff member's post is of limited or indefinite duration". It points out that the form was last updated in 1986, i.e. before the amendment of Rule 1050.6 and Manual paragraph II.9.260, and was not issued in pursuance of those provisions and that, besides, Budget used the term "indefinite" solely for its own purposes.

12. In answer to a query from the Division of Personnel about form 172 the chief of Budget stated in a memorandum dated 21 September 1995 that his unit did not give the terms "limited" and "indefinite" the same meaning as did Staff Rule 1050 and Manual paragraphs II.9.255 to 260. He explained that when the form "gives the Programme Manager our indication that the post is being established" as "indefinite", the meaning the word bore was the following:

> "The funding attached to the post is not time-limited and emanates from an unspecified source with some continuity, such as the regular budget

> (irrespective of location) or the unspecified part of the funds for some of the major extrabudgetary-funded programmes like ... GPA and posts financed from the Special Account for Servicing Costs. ..."

13. The Organization cites Judgment 1526 (*in re* Baigrie) on a case in which the complainant had produced form 172 as evidence of the nature of her post. But the issues in that case were whether failure to inform an applicant for employment that a post was of limited duration constituted breach of good faith and whether the Organization had ignored the staff member's rightful expectation of extension. The interpretation to be put on Rule 1050.6 and Manual paragraph II.9.260 and the legal effect of form 172 were not at issue. So Judgment 1526 affords no guidance on the material issues in the present case.

14. The sending of form 172 is an integral part of the procedure prescribed in Section III.3 of the Manual for the establishment of a post in the Organization and what the form says affords evidence of the nature of the created post both for budgetary and for personnel purposes. In this case the form refers to the creation of an "indefinite post". Moreover, the Tribunal does not construe the phrase "subject to continued need and availability of funds", which appear on the form, as a term of limitation. Where a post is "time-limited" the phrase is used to indicate the basis upon which action may be taken to extend the duration of a post; and where the post is "indefinite" it means that the post will continue until a decision is taken to abolish it either because there is no further need for it or because funds are no longer available.

15. In construing Rule 1050.6 and Manual paragraph II.9.260 the Tribunal will apply the principle that Judgment 470 declared under 3(d):

> "The relationship between Organization and staff is governed by the Staff Regulations, the Staff Rules and the Manual. The Regulations are supplemented by the Rules, which are elaborated on in the Manual. There is therefore a hierarchy under which the Rules may not derogate from the Regulations, nor the Manual from the Rules."

If a post established by the Organization does not fall within the definition of "limited duration" in Rule 1050.6, that is conclusive notwithstanding any provision of the Manual. Even a post initially established as "time-limited" for a period of two years from the date of recruitment will become a post of unlimited duration if, on the expiry of that period, it is extended without any limit of duration. The definitions in Rule 1050.6 are not in conflict but wholly consonant with the case law. In Judgment 515 the Tribunal declared:

> "A post is of limited duration if the instrument which creates it or controls its length prescribes for it a fixed period, whether long or short. If there is no such prescription, the post is of indefinite duration, whether it is expected to last a long or a short time. ..."

That ruling holds good. There is no conflict between 1050.6 and Manual paragraph II.9.260 because the latter requires that "This period [viz. the period for which the posts were established] is specified in the relevant authorised position lists or programme budget proposals and also in vacancy notices and post descriptions". The Manual paragraph does not create a new category of posts separate and distinct from those described in 1050.6. What it does is identify according to the source of funding posts that will qualify as ones of limited duration provided that they meet the requirements of the paragraph as to notification and the requirements of 1050.6 as to limit of duration.

16. Staff Rule 1050.2 reads:

> "When a post of indefinite duration - or any post held by a staff member with a career-service appointment - comes to an end, a reduction in force shall (if the post was filled) take place, in accordance with procedures established by the Director-General ..."

The complainant held a post of indefinite duration. On its abolition 1050.2 applied and the completion of the reduction-in-force procedure became a condition precedent to any decision to terminate her appointment, the object of the Rule being the retention of staff who, on the strength of past performance and seniority, deserve "priority for retention". As was held in Judgment 1045 (*in re* Mitastein), under 3, notice of termination will be invalid unless the requirements of 1050.2 have been observed. The complainant's plea succeeds.

The abolition of the complainant's post

17. The complainant further contends that, failing evidence of any decision taken by the WHO in accordance with Section III.3 of the Manual to abolish her post, the purported termination of her appointment would be devoid of any legal basis.

18. The Organization retorts in its surrejoinder:

> "No 'decision' was taken in accordance with the procedures described under Part III of the Manual when the complainant's post was abolished, since these procedures would have served no functional purpose. ... that decision had

ready been taken by the highest Organisational authority, the World Health ssembly."

9. The Tribunal observes that the Assembly's resolution on the shment of UNAIDS makes no mention of the abolition of posts under ganization's own GPA. That some decision was taken to abolish the osts is clear; there are, after all, constant references to it in the letters tices exhibited. Yet since employment in the Organization is governed lividual contracts of appointment to individual posts, a specific on to abolish the post was necessary. On the Organization's own ion none was taken. The complainant's plea again succeeds.

). Since the complainant succeeds on the grounds stated above it is cessary to entertain her plea about breach of the provisions governing of termination.

1. By way of relief the complainant seeks (1) the setting aside of the of termination of her appointment; (2) reinstatement as from ary 1996 and payment of salary, allowances and all other benefits due her previous conditions of employment, plus interest thereon at such s the Tribunal may set, subject to deduction of any termination nities and occupational earnings received by her between 1 January nd the actual date of reinstatement. She cites Judgments 1045, 1371 Ortiz) and 1374 (*in re* González and others) in support of her tion that in the absence of valid notice of termination a fixed-term ct is renewed by implication.

2. The WHO submits that, if the Tribunal allowed this and the similar aints, any relief it granted should strike an appropriate balance n providing fair and reasonable compensation and recognition of the ally heavy financial burden the Organization would have to bear if all nplainants were, say, reinstated. It points out that twenty-nine former f the GPA have filed similar internal appeals and that over two d such staff may apply to intervene in the complaints. It concludes the complaint were upheld, the Tribunal should, instead of ordering tement, have the Organization proceed directly to a reduction-in-force e. It cites Judgment 891 (*in re* Morris) in support of its view that that e may be carried out in the absence of reinstatement.

23. In the case that Judgment 891 ruled on the issue was whether the abolished post was of indefinite or limited duration. The Tribunal held that the post, having started as one of limited duration, had become an indefinite one on extension and that the complainant was therefore entitled to the application of the reduction-in-force procedure. Though he had applied for reinstatement for the purpose of carrying out the procedure, the Tribunal held that that was not necessary: the Organization could go through the procedure without reinstating him. The issues of the invalidity of the notice of termination and the consequences thereof which were raised in Mitastein were not raised in Morris. In Mitastein the invalidity of the notice of termination meant that that complainant's contract was renewed by implication and she was entitled not only to the application of the reduction-in-force procedure but also to payment of the salary and allowances due under her contract less any indemnity or earnings she might have received in the meantime.

24. The present complainant is likewise entitled to reinstatement with payment of salary and allowances and benefits due under her contract less any indemnity or earnings she may have received or receive until either her appointment is terminated after completion of the reduction-in-force procedure or she is redeployed under that procedure.

25. In view, however, of the recent decimation of posts in the WHO the Tribunal offers the Organization the alternative option of paying the complainant damages equal to the amounts payable under 24 above — without actually reinstating her in a post commensurate with her grade and experience — and of carrying out the procedure under the same conditions.

26. The complainant is entitled to the payment of the interest on the sums due at the rate of 8 per cent a year from the due dates and to an award of costs.

DECISION

1. The impugned decision is set aside.
2. The Organization shall either reinstate the complainant as set out in 24 or pay her damages as set out in 25.
3. It shall apply to her the reduction-in-force procedure.
4. It shall pay her interest at the rate of 8 per cent a year on the sums due.
5. It shall pay her 2,000 Swiss francs in costs.
6. All her other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

Wm Douglas

WILLIAM DOUGLAS

Mella Carroll

MELLA CARROLL

MARK FERNANDO

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-THIRD SESSION

***In re* Gray** **Judgment 1625**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Christine Mary Gray against the World Health Organization (WHO) on 21 June 1996, the WHO's reply of 23 September, the complainant's rejoinder of 3 December 1996 and the Organization's surrejoinder of 7 March 1997;

Considering the applications to intervene filed by

C. D. Betts
J.M. Halpin
Z.H.M. Najjar
M. Sinnott
R.J. Voetsch

and the Organization's observations thereon of 4 and 28 April and 7 and 13 May 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who is British, began working for the WHO in February 1982 under the first of several short-term contracts carrying out secretarial duties. In October 1984 she took up a fixed-term appointment as a secretary at grade G.4. In January 1988 she was promoted to grade G.5 and was transferred to a post of secretary in what was then known as the Special Programme on AIDS, which later became the Global Programme on AIDS (GPA). In form 172 "Notification of decision on position request", which the chief of Budget signed on 7 April 1987, the Administration had described post 1.3429 as "time-limited ... for a period of two years from date of recruitment, extension of post subject to continued need and availability of funds".

In a letter dated 26 September 1995 a senior officer of the Division of Personnel told her that the Organization had decided to terminate her appointment under Staff Rule 1050.1 at 31 December 1995, when her post was "scheduled for abolition" for want of funding. On 8 November 1995 she gave the headquarters Board of Appeal notice of appeal against termination.

By a letter of 19 March 1996 an Assistant Director-General informed the chairman of the Staff Committee that the Director-General was willing to give former staff of the Programme leave to go directly to the Tribunal. On 28 May 1996 the complainant told the headquarters Board that she was withdrawing her appeal.

B. The complainant submits that the decision to terminate her appointment was unlawful. She alleges breach of formal requirements about notice of termination in the WHO Manual and failure to carry out the "reduction-in-force procedure" required under Staff Rule 1050.2, which is about termination due to abolition of a post of indefinite duration. Though her post was originally one of limited duration, the WHO extended it without setting a new date of expiry and that made it one of indefinite duration. Since the Administration failed to inform her at the time of her transfer to the Programme that reassignment would entail a change in her contractual status, she was entitled in good faith to assume she had not lost the rights she held on her previous post, which was funded out of the regular budget.

She seeks the quashing of the notice of termination in the letter of 26 September 1995 and reinstatement as from 1 January 1996 with payment, with interest, of all entitlements due from that date less any occupational earnings up to the actual date of reinstatement. She claims 4,000 Swiss francs in costs.

C. In its reply the WHO says that it treated her fairly and in full compliance with the rules. The Manual provision she relies on does not apply to her case. Nor was she entitled to a reduction-in-force procedure under Rule 1050.2: her post being one of limited, not indefinite, duration, the material rule is 1050.1. Even if her original post in the Programme had been of indefinite duration, she could not rely on any acquired right to the conditions attached to a post of that nature. In any event the Organization did its utmost to find other employment for her. If the Tribunal ruled in her favour, the application of the reduction-in-force procedure would be a more appropriate remedy than reinstatement.

D. In her rejoinder the complainant rebuts the Organization's pleas and enlarges on her own. She presses her claims.

E. In its surrejoinder the WHO maintains that it met the "essential" requirements of the material provisions in the Manual and that there was no call to apply the reduction-in-force procedure to the complainant's case.

CONSIDERATIONS

1. The complainant began working for the Organization in February 1982 under short-term contracts. From October 1984 she held two-year contracts, the last of which was to expire at 31 October 1996. From 1984 until 31 December 1987 she held a regular budget post. As from 1 January 1988 she was assigned as secretary at grade G.5 in the then Special Programme on AIDS which later became the Global Programme on AIDS (GPA). Her post, No. 1.3429, had been established on 7 April 1987 as a "time-limited post for a period of two years from date of recruitment, extension of post subject to continued need and availability of funds" according to form 172 ("Notification of decision on position request"). By a letter dated 26 September 1995 the chief of Contract Administration and Information, in the Division of Personnel, told her that funding for her post would cease, and that the post itself would be abolished, at 31 December 1995 and that her appointment would end at that date in accordance with Staff Rule 1050.1. That rule reads:

> "The temporary appointment of a staff member engaged for a post of limited duration may be terminated prior to its expiration date if the post is abolished."

On 23 November 1995 the complainant gave notice of appeal against the decision to terminate her appointment and by agreement between the parties the case has been submitted directly to the Tribunal.

2. The background to the dispute is that, after discussion with other international bodies that were to offer sponsorship, the Economic and Social Council of the United Nations adopted in July 1994 resolution 1994/24 approving the establishment of a joint and co-sponsored United Nations programme on HIV/AIDS (UNAIDS). In May 1995 the 48th World Health Assembly adopted a resolution of its own in which it endorsed the establishment of UNAIDS – "to which WHO will provide the administrative framework" – and asked the Director-General to "arrange for WHO to meet the administrative needs of the Programme once it is operational, in the light

of the Organization's role as administering agency". The new Programme was to become "operational" by 1 January 1996.

3. By a memorandum of 6 March 1995 the Executive Director of the GPA informed all its staff at headquarters that it would cease to exist at 31 December 1995 and that the Division of Personnel would in due course be giving advice on each staff member's contractual position. He encouraged all the staff to apply for positions in UNAIDS and for suitable vacancies in the Organization. On 1 June 1995 the Director of the Division of Personnel forwarded to the Organization's senior officers a "List of GPA/WHO Professional staff available for reassignment" – there were 87 – together with a one-page curriculum vitae for each of them. On 20 June 1995 he forwarded to the Legal Counsel a "List of GPA/WHO General Service staff available for reassignment", of whom there were 35 and for each of whom he again appended a one-page curriculum vitae.

4. The closure of GPA led to the displacement of 242 staff, of whom 131 were at headquarters. To make matters worse, it came at a time when, as a result of acceptance of "zero growth" in the Organization's regular budget, 167 of its posts, some of which were vacant, had to be abolished anyway.

5. Notwithstanding the difficulties the Organization made efforts to reassign staff, to arrange for early retirement and mutually-agreed separation in suitable cases and to obtain employment elsewhere for the GPA staff. But it still had to carry out a "reduction-in-force" exercise for 27 staff who in its opinion held posts of indefinite duration or who had career service appointments. It granted all former GPA staff a terminal indemnity equivalent to at least three months' pay whether or not they were so entitled under the Staff Rules.

6. There are three grounds of complaint:

(a) breach of the provisions governing notice of termination of appointment;

(b) breach of the procedural requirements applicable in the event of termination on account of abolition of post; and

(c) failure to inform the complainant of a change in her contractual status.

The Tribunal will take up (b) first.

The duration of the complainant's post

7. The fundamental issue in this case is whether the post which the complainant occupied was of indefinite duration, as she contends, or of limited duration, as the Organization maintains. The Tribunal has already had occasion to determine whether a post is of indefinite or limited duration: see, for example, Judgments 470 (*in re* Perrone), 515 (*in re* Vargas), 891 (*in re* Morris) and 974 (*in re* Birendar Singh). In considering that issue a distinction must be drawn between the duration of the post and the duration of the appointment of the incumbent. It is a distinction that the Tribunal drew in Judgment 974.

8. The WHO argues that the reasoning in those judgments has ceased to apply because Staff Rule 1050.6 was amended as from 1 January 1989 to lay down definitions of duration. It now reads:

> "Posts of indefinite duration comprise those that continue in existence unless and until an express decision is taken to abolish them. Posts of limited duration automatically lapse at the end of the period for which they were established unless an express decision is taken to continue them. The Director-General shall determine the categories of posts falling within each of the above two definitions."

9. Other material rules include Manual paragraph II.9.260, which came into force on 20 September 1989 and which reads:

> "Reduction-in-force provisions do not apply to posts of limited duration; incumbents of such posts are not affected by these provisions and cannot benefit from them. Posts of limited duration automatically lapse at the end of the period for which they were established unless an express decision is taken to continue them. This period is specified in the relevant authorized position lists or programme budget proposals and also in vacancy notices and post descriptions. Posts of limited duration include:
>
> 260.1 posts financed from non-regular budget funds located either at Headquarters or at a regional office;
>
> 260.2 inter-regional or inter-country project posts;
>
> 260.3 country project posts, irrespective of the source of funds;
>
> 260.4 posts financed from the regular budget that have been expressly established for a specific period."

10. The procedure for the establishment and abolition of posts is set out in Section III.3 of the Manual. That provision has undergone many amendments since 1985; thus until 1991 a request for the establishment of a post had to be addressed to the Director of Personnel, and over the years some departments have changed names: for example, the Office of Administrative Management and Evaluation has become the Office of Staff

and Management Development. But the basic procedure remains the same. The version dated 15 April 1991 of Section III.3 provides in paragraph 40:

> "Requests for the establishment or abolition of posts are addressed to Chief Budget in the first instance for review and advice as to availability of funding. The requests are then sent to the Director of Personnel who makes a preliminary review and transmits the request to the Office of Administrative Management and Evaluation for review and analysis. Administrative Management and Evaluation, if this appears necessary, obtains the observations of appropriate units at headquarters. Budget is responsible for consolidating the comments into a proposal for presentation together with the request to the Director-General and for notifying those concerned of the Director-General's decision."

The request is to be entered in form 171 ("Authorized position request") and a description of the post to be attached on form 81 ("Post description"). Again according to Section III.3, the Budget unit reviews the request so as to determine:

> "90.1 the date from which the post could be covered;
> 90.2 the funding during the current financial period;
> 90.3 the effect on subsequent financial periods and on the budget;
> 90.4 any other implications resulting from the establishment of the post."

Lastly, the same section states in paragraph 130:

> "The Director-General takes a decision on the request and returns the documents to Budget. The decision and any significant comments or recommendations, including the effective date if the request is approved, are conveyed by Budget on form WHO 172, Notification of Decision on Position Request, to the originator of the request, with a copy to Personnel."

11. The Organization submits that the category in which the complainant's post fell is to be determined solely by reference to Rule 1050.6 (see 8 above) and to Manual paragraph II.9.260 (see 9 above). Though acknowledging that neither vacancy notice nor post description contained any statement about the duration of the post, it argues that "no Organizational 'state of mind' can be inferred from the absence of information on these forms". It concedes that form 172 may describe some posts as "indefinite, subject to continued need and availability of funds" and others as "time-limited posts for period of two years from date of recruitment, extension of post subject to continued need and availability of funds". But – it argues – that form is "not the fundamental document that establishes whether a staff member's post is of limited or indefinite duration". It points out that the form was last updated in 1986, i.e. before

the amendment of Rule 1050.6 and Manual paragraph II.9.260, and was not issued in pursuance of those provisions and that besides Budget used the term "indefinite" solely for its own purposes.

12. In answer to a query from the Division of Personnel about form 172 the chief of Budget stated in a memorandum dated 21 September 1995 that his unit did not give the terms "limited" and "indefinite" the same meaning as did Staff Rule 1050 and Manual paragraphs II.9.255 to 260. He explained that when the form "gives the Programme Manager our indication that the post is being established" as "indefinite", the meaning the word bore was the following:

> "The funding attached to the post is not time-limited and emanates from an unspecified source with some continuity, such as the regular budget (irrespective of location) or the unspecified part of the funds for some of the major extrabudgetary-funded programmes like ... GPA and posts financed from the Special Account for Servicing Costs. ..."

13. The Organization cites Judgment 1526 (*in re* Baigrie) on a case in which the complainant had produced form 172 as evidence of the nature of her post. But the issues in that case were whether failure to inform an applicant for employment that a post was of limited duration constituted breach of good faith and whether the Organization had ignored the staff member's rightful expectation of extension. The interpretation to be put on Rule 1050.6 and Manual paragraph II.9.260 and the legal effect of form 172 were not at issue. So Judgment 1526 affords no guidance on the material issues in the present case.

14. The sending of form 172 is an integral part of the procedure prescribed in Section III.3 of the Manual for the establishment of a post in the Organization and what the form says affords evidence of the nature of the created post both for budgetary and for personnel purposes. In this case the form refers to the creation of a "time-limited post for two years from the date of recruitment". Moreover, the Tribunal does not construe the phrase "subject to continued need and availability of funds", which appear on the form, as a term of limitation. Where a post is "time-limited" the phrase is used to indicate the basis upon which action may be taken to extend the duration of a post; and where the post is "indefinite" it means that the post will continue until a decision is taken to abolish it either because there is no further need for it or because funds are no longer available. To extend a "time-limited" post by another limited period it is necessary to take another

decision specifying such limitation. There is no evidence of any such decision in this case.

15. In construing Rule 1050.6 and Manual paragraph II.9.260 the Tribunal will apply the principle that Judgment 470 declared under 3(d):

> "The relationship between Organization and staff is governed by the Staff Regulations, the Staff Rules and the Manual. The Regulations are supplemented by the Rules, which are elaborated on in the Manual. There is therefore a hierarchy under which the Rules may not derogate from the Regulations, nor the Manual from the Rules."

If a post established by the Organization does not fall within the definition of "limited duration" in Rule 1050.6, that is conclusive notwithstanding any provision of the Manual. Even a post initially established as "time-limited" for a period of two years from the date of recruitment will become a post of unlimited duration if, on the expiry of that period, it is extended without any limit of duration. The definitions in Rule 1050.6 are not in conflict but wholly consonant with the case law. In Judgment 515 the Tribunal declared:

> "A post is of limited duration if the instrument which creates it or controls its length prescribes for it a fixed period, whether long or short. If there is no such prescription, the post is of indefinite duration, whether it is expected to last a long or a short time. ..."

That ruling holds good. There is no conflict between 1050.6 and Manual paragraph II.9.260 because the latter requires that "This period [viz. the period for which the posts were established] is specified in the relevant authorized position lists or programme budget proposals and also in vacancy notices and post descriptions". The Manual paragraph does not create a new category of posts separate and distinct from those described in 1050.6. What it does is identify according to the source of funding posts that will qualify as ones of limited duration provided that they meet the requirements of the paragraph as to notification and the requirements of 1050.6 as to limit of duration.

16. Staff Rule 1050.2 reads:

> "When a post of indefinite duration - or any post held by a staff member with a career-service appointment - comes to an end, a reduction in force shall (if the post was filled) take place, in accordance with procedures established by the Director-General ..."

The complainant held a time-limited post that became one of indefinite duration. On its abolition 1050.2 applied and the completion of the reduction-in-force procedure became a condition precedent to any decision to terminate her appointment, the object of the Rule being the retention of staff who, on the strength of past performance and seniority, deserve "priority for retention". As was held in Judgment 1045 (*in re* Mitastein) under 3, notice of termination will be invalid unless the requirements of 1050.2 have been observed. The complainant's plea succeeds.

The abolition of the complainant's post

17. The complainant further contends that, failing evidence of any decision taken by the WHO in accordance with Section III.3 of the Manual to abolish her post, the purported termination of her appointment would be devoid of any legal basis.

18. The Organization retorts in its surrejoinder:

> "No 'decision' was taken in accordance with the procedures described under Part III of the Manual when the complainant's post was abolished, since these procedures would have served no functional purpose. ... that decision had already been taken by the highest Organisational authority, the World Health Assembly."

19. The Tribunal observes that the Assembly's resolution on the establishment of UNAIDS makes no mention of the abolition of posts under the Organization's own GPA. That some decision was taken to abolish the GPA posts is clear; there are, after all, constant references to it in the letters and notices exhibited. Yet since employment in the Organization is governed by individual contracts of appointment to individual posts, a specific decision to abolish the post was necessary. On the Organization's own admission none was taken. The complainant's plea again succeeds.

20. Since the complainant succeeds on the grounds stated above it is not necessary to entertain her other two pleas, about breach of the provisions governing notice of termination and about failure to tell her of a change in her contractual status.

Relief

21. By way of relief the complainant seeks (1) the setting aside of the notice of termination of her appointment; (2) reinstatement as from 1 January 1996 and payment of salary, allowances and all other benefits

due under her previous conditions of employment, plus interest thereon at such rate as the Tribunal may set, subject to deduction of any termination indemnities and occupational earnings received by her between 1 January 1996 and the actual date of reinstatement. She cites Judgments 1045, 1371 (*in re* Ortiz) and 1374 (*in re* González and others) in support of her contention that in the absence of valid notice of termination a fixed-term contract is renewed by implication.

22. The WHO submits that, if the Tribunal allowed this and the similar complaints, any relief it granted should strike an appropriate balance between providing fair and reasonable compensation and recognition of the potentially heavy financial burden the Organization would have to bear if all the complainants were, say, reinstated. It points out that twenty-nine former staff of the GPA have filed similar internal appeals and that over two hundred such staff may apply to intervene in the complaints. It concludes that, if the complaint were upheld, the Tribunal should, instead of ordering reinstatement, have the Organization proceed directly to a reduction-in-force exercise. It cites Judgment 891 (*in re* Morris) in support of its view that that exercise may be carried out in the absence of reinstatement.

23. In the case that Judgment 891 ruled on the issue was whether the abolished post was of indefinite or limited duration. The Tribunal held that the post, having started as one of limited duration, had become an indefinite one on extension and that the complainant was therefore entitled to the application of the reduction-in-force procedure. Though he had applied for reinstatement for the purpose of carrying out the procedure, the Tribunal held that that was not necessary: the Organization could go through the procedure without reinstating him. The issues of the invalidity of the notice of termination and the consequences thereof which were raised in Mitastein were not raised in Morris. In Mitastein the invalidity of the notice of termination meant that that complainant's contract was renewed by implication and she was entitled not only to the application of the reduction-in-force procedure but also to payment of the salary and allowances due under her contract less any indemnity or earnings she might have received in the meantime.

24. The present complainant is likewise entitled to reinstatement with payment of salary and allowances and benefits due under her contract less any indemnity or earnings she may have received or receive until either her appointment is terminated after completion of the reduction-in-force procedure or she is redeployed under that procedure.

25. In view, however, of the recent decimation of posts in the WHO the Tribunal offers the Organization the alternative option of paying the complainant damages equal to the amounts payable under 24 above - without actually reinstating her in a post commensurate with her grade and experience - and of carrying out the procedure under the same conditions.

26. The complainant is entitled to the payment of interest on the sums due at the rate of 8 per cent a year from the due dates and to an award of costs.

27. The Tribunal allows the applications to intervene, the applicants do have the same rights as the complainant, save as to costs, insofar as they are in the same position in law and in fact as she.

DECISION

1. The impugned decision is set aside.
2. The Organization shall either reinstate the complainant as set out in 24 or pay her damages as set out in 25.
3. It shall apply to her the reduction-in-force procedure.
4. It shall pay her interest at the rate of 8 per cent a year on the sums due.
5. It shall pay her 2,000 Swiss francs in costs.
6. All her other claims are dismissed.
7. The applications to intervene are allowed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

Wm Douglas

WILLIAM DOUGLAS

Mella Carroll

MELLA CARROLL

MARK FERNANDO

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner

A.B. GARDNER

EIGHTY-THIRD SESSION

***In re* Lewis** **Judgment 1626**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. David Lewis against the World Health Organization (WHO) on 11 June 1996, the WHO's reply of 11 September, the complainant's rejoinder of 25 November 1996 and the Organization's surrejoinder of 28 February 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who is British, joined the staff of the WHO in July 1992 under a short-term appointment as an editor at grade P.4 in the Global Programme on AIDS (GPA). After a one-month break in contract he got a second short-term appointment in July 1993. The following September he got a two-year fixed-term appointment on a grade P.3 post — No. 1.3886 — as editor with the GPA. In form 172, "Notification of decision on position request", which the Chief of Budget signed on 2 December 1991, the Administration had described his post as "indefinite, subject to continued need and availability of funds". In September 1995 the Organization extended his appointment by just over three months, to 31 December 1995.

In a letter dated 27 September 1995, which he received on 2 October 1995, a senior officer of the Division of Personnel told him that the Organization had decided to terminate his appointment under Staff Rule 1040 - headed "Completion of temporary appointments" - at 31 December 1995, when his post was "scheduled for abolition" for want of funding. On 13 November 1995 he gave the headquarters Board of Appeal notice of appeal against termination.

By a letter of 19 March 1996 an Assistant Director-General informed the chairman of the Staff Committee that the Director-General was willing to give former staff of the Programme leave to go directly to the Tribunal. On 28 May 1996 the complainant told the headquarters Board that he was withdrawing his appeal.

B. The complainant submits that the decision to terminate his appointment was unlawful. He alleges breach of formal requirements about notice of termination in the WHO Manual and failure to carry out the "reduction-in-force procedure" required under Staff Rule 1050.2, which is about termination due to abolition of a post of indefinite duration. He points out that the Administration did not give him sufficient notice of termination and relies on precedent which declares such notice invalid and entails tacit renewal. He also objects to the Organization's failure to put him on another vacant post which he was qualified for.

He seeks the quashing of the notice of termination in the letter of 27 September 1995 and reinstatement as from 1 January 1996 with payment, plus interest, of all entitlements due from that date less any occupational earnings he may have had up to the actual date of reinstatement. He claims 4,000 Swiss francs in costs.

C. In its reply the WHO says that it treated him fairly and in full compliance with the rules. He got notice of termination a "mere" two days after the period of notice began. The Manual provision he relies on does not apply to his case. Nor was he entitled to a reduction-in-force procedure under Rule 1050.2: the completion of his appointment did not coincide with the abolition of a post of indefinite duration and so the applicable provision was Rule 1040. In any event the Organization "made diligent efforts" to find other employment for him. If the Tribunal ruled in his favour, the application of the reduction-in-force procedure would be a more appropriate remedy than reinstatement.

D. In his rejoinder the complainant rebuts the Organization's pleas and enlarges on his own. He presses his claims.

E. In its surrejoinder the WHO maintains that it met the "essential" requirements of the material provisions in the Manual and that there was no call to apply the reduction-in-force procedure to the complainant's case.

CONSIDERATIONS

1. The Organization first employed the complainant in July 1992 as an editor under its Global Programme on AIDS (GPA). On 26 September 1993 it appointed him to post No. 1.3886 as editor/writer in the Planning and Policy Co-ordination Unit of the Programme at grade P.3 under a two-year contract, the first year of which was probationary. The post had been established on 2 December 1991 as "indefinite, subject to continued need and availability of funds" according to form 172 ("Notification of decision on position request"). He had his appointment extended until 31 December 1995. The chief of Contract Administration and Information, in the Division of Personnel, wrote him a letter dated 27 September 1995, which he got on return from a mission on 2 October 1995, to say that funding for his post would cease, and the post itself would be abolished, at 31 December 1995 and that his appointment would terminate at that date in accordance with Staff Rule 1040. That rule reads:

> "Temporary appointments, both fixed-term and short-term, shall terminate automatically on the completion of the agreed period of service in the absence of any offer and acceptance of extension. However, a staff member serving under a fixed-term appointment of one year or more, whom it has been decided not to reappoint, shall be notified thereof not later than three months before the date of expiry of the contract ..."

On 13 November 1995 the complainant gave notice of appeal against the decision to terminate his appointment and by agreement between the parties the case has been submitted directly to the Tribunal.

2. The background to the dispute is that, after discussion with other international bodies that were to offer sponsorship, the Economic and Social Council of the United Nations adopted in July 1994 resolution 1994/24 approving the establishment of a joint and co-sponsored United Nations Programme on HIV/AIDS (UNAIDS). In May 1995 the 48th World Health Assembly adopted a resolution of its own in which it endorsed the establishment of UNAIDS – "to which WHO will provide the administrative framework" – and asked the Director-General to "arrange for WHO to meet the administrative needs of the Programme once it is operational, in the light of the Organization's role as administering agency". The new Programme was to become "operational" by 1 January 1996.

3. By a memorandum of 6 March 1995 the Executive Director of the GPA informed all its staff at headquarters that it would cease to exist at 31 December 1995 and that the Division of Personnel would in due course

be giving advice on each staff member's contractual position. He encouraged all the staff to apply for positions in UNAIDS and for suitable vacancies in the Organization. On 1 June 1995 the Director of the Division of Personnel forwarded to the Organization's senior officers a "List of GPA/WHO Professional staff available for reassignment" – there were 87 – together with a one-page curriculum vitae for each of them. On 20 June 1995 he forwarded to the Legal Counsel a "List of GPA/WHO General Service staff available for reassignment", of whom there were 35 and for each of whom he again appended a one-page curriculum vitae.

4. The closure of GPA led to the displacement of 242 staff, of whom 131 were at headquarters. To make matters worse, it came at a time when, as a result of acceptance of "zero growth" in the Organization's regular budget, 167 of its posts, some of which were vacant, had to be abolished anyway.

5. Notwithstanding the difficulties the Organization made efforts to reassign staff, to arrange for early retirement and mutually-agreed separation in suitable cases and to obtain employment elsewhere for the GPA staff. But it still had to carry out a "reduction-in-force" exercise for 27 staff who in its opinion held posts of indefinite duration or who had career service appointments. It granted all former GPA staff a terminal indemnity equivalent to at least three months' pay whether or not they were so entitled under the Staff Rules.

6. There are two grounds of complaint:

(a) breach of the provisions governing notice of termination of appointment; and

(b) breach of the procedural requirements applicable in the event of termination on account of abolition of post.

The Tribunal will take up (b) first.

The duration of the complainant's post

7. The fundamental issue in this case is whether the post which the complainant occupied was of indefinite duration, as he contends, or of limited duration, as the Organization maintains. The Tribunal has already had occasion to determine whether a post is of indefinite or limited duration: see, for example, Judgments 470 (*in re* Perrone), 515 (*in re* Vargas), 891 (*in re* Morris) and 974 (*in re* Birendar Singh). In considering that issue a

distinction must be drawn between the duration of the post and the duration of the appointment of the incumbent. It is a distinction that the Tribunal drew in Judgment 974.

8. The WHO argues that the reasoning in those judgments has ceased to apply because Staff Rule 1050.6 was amended as from 1 January 1989 to lay down definitions of duration. It now reads:

> "Posts of indefinite duration comprise those that continue in existence unless and until an express decision is taken to abolish them. Posts of limited duration automatically lapse at the end of the period for which they were established unless an express decision is taken to continue them. The Director-General shall determine the categories of posts falling within each of the above two definitions."

9. Other material rules include Manual paragraph II.9.260, which came into force on 20 September 1989 and which reads:

> "Reduction-in-force provisions do not apply to posts of limited duration, incumbents of such posts are not affected by these provisions and cannot benefit from them. Posts of limited duration automatically lapse at the end of the period for which they were established unless an express decision is taken to continue them. This period is specified in the relevant authorized position lists or programme budget proposals and also in vacancy notices and post descriptions. Posts of limited duration include:
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10. The procedure for the establishment and abolition of posts is set out in Section III.3 of the Manual. That provision has undergone many amendments since 1985; thus until 1991 a request for the establishment of a post had to be addressed to the Director of Personnel, and over the years some departments have changed names: for example, the Office of Administrative Management and Evaluation has become the Office of Staff and Management Development. But the basic procedure remains the same. The version dated 15 April 1991 of Section III.3 provides in paragraph 40:

> "Requests for the establishment or abolition of posts are addressed to Chief Budget in the first instance for review and advice as to availability of funding. The requests are then sent to the Director of Personnel who makes a preliminary review and transmits the request to the Office of Administrative Management and Evaluation for review and analysis. Administrative Management and Evaluation, if this appears necessary, obtains the observations of appropriate units at headquarters. Budget is responsible for consolidating the comments into a proposal for presentation together with the request to the Director-General and for notifying those concerned of the Director-General's decision."

The request is to be entered in form 171 ("Authorized position request") and a description of the post to be attached on form 81 ("Post description"). Again according to Section III.3, the Budget unit reviews the request so as to determine:

> "90.1 the date from which the post could be covered;
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> 90.4 any other implications resulting from the establishment of the post."

Lastly, the same section states in paragraph 130:

> "The Director-General takes a decision on the request and returns the documents to Budget. The decision and any significant comments or recommendations, including the effective date if the request is approved, are conveyed by Budget on form WHO 172, Notification of Decision on Position Request, to the originator of the request, with a copy to Personnel."

11. The Organization submits that the category in which the complainant's post fell is to be determined solely by reference to Rule 1050.6 (see 8 above) and to Manual paragraph II.9.260 (see 9 above). Though acknowledging that neither vacancy notice nor post description contained any statement about the duration of the post, it argues that "no Organizational 'state of mind' can be inferred from the absence of information on these forms". It concedes that form 172 may describe some posts as "indefinite, subject to continued need and availability of funds" and others as "time-limited posts for period of two years from date of recruitment, extension of post subject to continued need and availability of funds". But – it argues – that form is "not the fundamental document that establishes whether a staff member's post is of limited or indefinite

duration". It points out that the form was last updated in 1986, i.e. before the amendment of Rule 1050.6 and Manual paragraph II.9.260, and was not issued in pursuance of those provisions and that, besides, Budget used the term "indefinite" solely for its own purposes.

12. In answer to a query from the Division of Personnel about form 172 the chief of Budget stated in a memorandum dated 21 September 1995 that his unit did not give the terms "limited" and "indefinite" the same meaning as did Staff Rule 1050 and Manual paragraphs II.9.255 to 260. He explained that when the form "gives the Programme Manager our indication that the post is being established" as "indefinite", the meaning the word bore was the following:

> "The funding attached to the post is not time-limited and emanates from an unspecified source with some continuity, such as the regular budget (irrespective of location) or the unspecified part of the funds for some of the major extrabudgetary-funded programmes like ... GPA and posts financed from the Special Account for Servicing Costs ...."

13. The Organization cites Judgment 1526 (*in re* Baigrie) on a case in which the complainant had produced form 172 as evidence of the nature of her post. But the issues in that case were whether failure to inform an applicant for employment that a post was of limited duration constituted breach of good faith and whether the Organization had ignored the staff member's rightful expectation of extension. The interpretation to be put on Rule 1050.6 and Manual paragraph II.9.260 and the legal effect of form 172 were not at issue. So Judgment 1526 affords no guidance on the material issues in the present case.

14. The sending of form 172 is an integral part of the procedure prescribed in Section III.3 of the Manual for the establishment of a post in the Organization and what the form says affords evidence of the nature of the created post both for budgetary and for personnel purposes. In this case the form refers to the creation of an "indefinite post". Moreover, the Tribunal does not construe the phrase "subject to continued need and availability of funds", which appear on the form, as a term of limitation. Where a post is "time-limited" the phrase is used to indicate the basis upon which action may be taken to extend the duration of a post; and where the post is "indefinite" it means that the post will continue until a decision is taken to abolish it either because there is no further need for it or because funds are no longer available.

15. In construing Rule 1050.6 and Manual paragraph II.9.260 the Tribunal will apply the principle that Judgment 470 declared under 3(d):

> "The relationship between Organization and staff is governed by the Staff Regulations, the Staff Rules and the Manual. The Regulations are supplemented by the Rules, which are elaborated on in the Manual. There is therefore a hierarchy under which the Rules may not derogate from the Regulations, nor the Manual from the Rules."

If a post established by the Organization does not fall within the definition of "limited duration" in Rule 1050.6, that is conclusive notwithstanding any provision of the Manual. Even a post initially established as "time-limited" for a period of two years from the date of recruitment will become a post of unlimited duration if, on the expiry of that period, it is extended without any limit of duration. The definitions in Rule 1050.6 are not in conflict but wholly consonant with the case law. In Judgment 515 the Tribunal declared:

> "A post is of limited duration if the instrument which creates it or controls its length prescribes for it a fixed period, whether long or short. If there is no such prescription, the post is of indefinite duration, whether it is expected to last a long or a short time. ..."

That ruling holds good. There is no conflict between 1050.6 and Manual paragraph II.9.260 because the latter requires that "This period [viz. the period for which the posts were established] is specified in the relevant authorized position lists or programme budget proposals and also in vacancy notices and post descriptions". The Manual paragraph does not create a new category of posts separate and distinct from those described in 1050.6. What it does is identify according to the source of funding posts that will qualify as ones of limited duration provided that they meet the requirements of the paragraph as to notification and the requirements of 1050.6 as to limit of duration.

16. Staff Rule 1050.2 reads:

> "When a post of indefinite duration - or any post held by a staff member with a career-service appointment - comes to an end, a reduction in force shall (if the post was filled) take place, in accordance with procedures established by the Director-General ..."

The complainant held a post of indefinite duration. On its abolition 1050.2 applied and the completion of the reduction-in-force procedure became a condition precedent to any decision to terminate his appointment, the object of the Rule being the retention of staff who, on the strength of past performance and seniority, deserve "priority for retention". As was held in Judgment 1045 (*in re* Mitastein), under 3, notice of termination will be invalid unless the requirements of 1050.2 have been observed. The complainant's plea succeeds.

The abolition of the complainant's post

17. The complainant further contends that, failing evidence of any decision taken by the WHO in accordance with Section III.3 of the Manual to abolish his post, the purported termination of his appointment would be devoid of any legal basis.

18. The Organization retorts in its surrejoinder:

> "No 'decision' was taken in accordance with the procedures described under Part III of the Manual when the complainant's post was abolished, since these procedures would have served no functional purpose. ... that decision had already been taken by the highest Organisational authority, the World Health Assembly."

19. The Tribunal observes that the Assembly's resolution on the establishment of UNAIDS makes no mention of the abolition of posts under the Organization's own GPA. That some decision was taken to abolish the GPA posts is clear; there are, after all, constant references to it in the letters and notices exhibited. Yet since employment in the Organization is governed by individual contracts of appointment to individual posts, a specific decision to abolish the post was necessary. On the Organization's own admission none was taken. The complainant's plea again succeeds.

20. Since the complainant succeeds on the grounds stated above it is not necessary to entertain his plea about breach of the provisions governing notice of termination.

Relief

21. By way of relief the complainant seeks (1) the setting aside of the notice of termination of his appointment; (2) reinstatement as from 1 January 1996 and payment of salary, allowances and all other benefits due under his

previous conditions of employment, plus interest thereon at such rate as the Tribunal may set, subject to deduction of any termination indemnities and occupational earnings received by him between 1 January 1996 and the actual date of reinstatement. He cites Judgments 1045, 1371 (*in re* Ortiz) and 1374 (*in re* González and others) in support of his contention that in the absence of valid notice of termination a fixed-term contract is renewed by implication.

22. The WHO submits that, if the Tribunal allowed this and the similar complaints, any relief it granted should strike an appropriate balance between providing fair and reasonable compensation and recognition of the potentially heavy financial burden the Organization would have to bear if all the complainants were, say, reinstated. It points out that twenty-nine former staff of the GPA have filed similar internal appeals and that over two hundred such staff may apply to intervene in the complaints. It concludes that, if the complaint were upheld, the Tribunal should, instead of ordering reinstatement, have the Organization proceed directly to a reduction-in-force exercise. It cites Judgment 891 (*in re* Morris) in support of its view that that exercise may be carried out in the absence of reinstatement.

23. In the case that Judgment 891 ruled on the issue was whether the abolished post was of indefinite or limited duration. The Tribunal held that the post, having started as one of limited duration, had become an indefinite one on extension and that the complainant was therefore entitled to the application of the reduction-in-force procedure. Though he had applied for reinstatement for the purpose of carrying out the procedure, the Tribunal held that that was not necessary: the Organization could go through the procedure without reinstating him. The issues of the invalidity of the notice of termination and the consequences thereof which were raised in Mitastein were not raised in Morris. In Mitastein the invalidity of the notice of termination meant that that complainant's contract was renewed by implication and she was entitled not only to the application of the reduction-in-force procedure but also to payment of the salary and allowances due under her contract less any indemnity or earnings she might have received in the meantime.

24. The present complainant is likewise entitled to reinstatement with payment of salary and allowances and benefits due under his contract less any indemnity or earnings he may have received or receive until either his appointment is terminated after completion of the reduction-in-force procedure or he is redeployed under that procedure.

25. In view, however, of the recent decimation of posts in the WHO the Tribunal offers the Organization the alternative option of paying the complainant damages equal to the amounts payable under 24 above - without actually reinstating him in a post commensurate with his grade and experience - and of carrying out the procedure under the same conditions.

26. The complainant is entitled to the payment of interest on the sums due at the rate of 8 per cent a year from the due dates and to an award of costs.

DECISION

1. The impugned decision is set aside.
2. The Organization shall either reinstate the complainant as set out in 24 or pay him damages as set out in 25.
3. It shall apply to him the reduction-in-force procedure.
4. It shall pay him interest at the rate of 8 per cent a year on the sums due.
5. It shall pay him 2,000 Swiss francs in costs.
6. All his other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

Wm Douglas

WILLIAM DOUGLAS

Mella Carroll

MELLA CARROLL

MARK FERNANDO

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-THIRD SESSION

***In re* Ratcliffe** **Judgment 1627**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Penelope Ratcliffe against the World Health Organization (WHO) on 15 July 1996, the WHO's reply of 14 October, the complainant's rejoinder of 3 December 1996 and the Organization's surrejoinder of 7 March 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. From 1969 until 1974 the complainant, who is British, was on the staff of the WHO, first as a clerk/stenographer and later as a secretary. In July 1982 she went back, the Organization offering her a short-term appointment as a secretary. On 1 February 1984 she got a fixed-term appointment for two years as a secretary at grade G.4. The WHO extended it in 1986 by two years. On 1 August 1987 she was promoted to grade G.5 on a post as secretary in the office of the Director of the then Special Programme on AIDS, which later became the Global Programme on AIDS (GPA). On 1 July 1988 she got another promotion, to G.6, as administrative assistant to the Director of the Programme. On 1 February 1990 the WHO extended her appointment by five years and, on 1 March 1991, it put her on a new post – No. 1.3825 – as a technical assistant at G.6 in the Office of Research. On 1 January 1995 it extended her appointment by another five years. In form 172 "Notification of decision on position request", which the chief of the Budget signed on 19 February 1991, the Administration had described that post as "indefinite, subject to continued need and availability of funds".

In a letter dated 26 September 1995 a senior officer of the Division of Personnel told her that the Organization had decided to terminate her appointment under Staff Rule 1050.1 at 31 December 1995, when her post was "scheduled for abolition" for want of funding. On 3 November 1995 she gave the headquarters Board of Appeal notice of appeal against termination.

By a letter of 19 March 1996 an Assistant Director-General informed the chairman of the Staff Committee that the Director-General was willing to give former staff of the Programme leave to go directly to the Tribunal. On 28 May 1996 the complainant told the headquarters Board that she was withdrawing her appeal.

B. The complainant submits that the decision to terminate her appointment was unlawful. She alleges breach of formal requirements about notice of termination in the WHO Manual and failure to carry out the "reduction-in-force procedure" required under Staff Rule 1050.2, which is about termination due to abolition of a post of indefinite duration.

She seeks the quashing of the notice of termination in the letter of 26 September 1995 and reinstatement as from 1 January 1996 with payment, plus interest, of all entitlements due from that date less any occupational earnings she may have had up to the actual date of reinstatement. She claims 4,000 Swiss francs in costs.

C. In its reply the WHO says that it treated her fairly and in full compliance with the rules. The Manual provision she relies on does not apply to her case. Nor was she entitled to a reduction-in-force procedure under Rule 1050.2: her post being one of limited, not indefinite, duration, the material rule is 1050.1. In any event the Organization did its utmost to find other employment for her. If the Tribunal should rule in the complainant's favour, the application of the reduction-in-force procedure would be a more appropriate remedy than reinstatement.

D. In her rejoinder the complainant rebuts the Organization's pleas and enlarges on her own. She presses her claims.

E. In its surrejoinder the WHO maintains that it met the "essential" requirements of the material provisions in the Manual and that there was no call to apply the reduction-in-force procedure to the complainant's case.

CONSIDERATIONS

1. The complainant first joined the Organization in February 1969. From November 1972 until December 1974 she served in its Regional Office for Europe. She served at headquarters from July 1982 under short-term contracts. In 1987 she was seconded to the Special Programme on AIDS, the precursor of the Global Programme on AIDS (GPA) and promoted to grade G.5. In 1988 her post was upgraded to G.6. On 1 February 1990 her appointment was extended by five years to 31 January 1995. On 1 March 1991 she was reassigned to a new post, No. 1.3825, as a technical assistant under the GPA. The post had been established on 19 February 1991 as "indefinite, subject to continued need and availability of funds" according to form 172 ("Notification of decision on position request"). Her appointment was extended by another five years. By a letter dated 26 September 1995 the chief of Contract Administration and Information, in the Division of Personnel, told her that funding for her post would cease, and the post itself would be abolished, at 31 December 1995 and that her appointment would terminate at that date in accordance with Staff Rule 1050.1. That rule reads:

> "The temporary appointment of a staff member engaged for a post of limited duration may be terminated prior to its expiration date if the post is abolished."

On 3 November 1995 the complainant gave notice of appeal against the decision to terminate her appointment and by agreement between the parties her complaint has been submitted directly to the Tribunal.

2. The background to the dispute is that, after discussion with other international bodies that were to offer sponsorship, the Economic and Social Council of the United Nations adopted in July 1994 resolution 1994/24 approving the establishment of a joint and co-sponsored United Nations programme on HIV/AIDS (UNAIDS). In May 1995 the 48th World Health Assembly adopted a resolution of its own in which it endorsed the establishment of UNAIDS – "to which WHO will provide the administrative framework" – and asked the Director-General to "arrange for WHO to meet the administrative needs of the Programme once it is operational in the light of the Organization's role as administering agency". The new Programme was to become "operational" by 1 January 1996.

3. By a memorandum of 6 March 1995 the Executive Director of the GPA informed all its staff at headquarters that it would cease to exist at 31 December 1995 and that the Division of Personnel would in due course be giving advice on each staff member's contractual position. He encouraged all the staff to apply for positions in UNAIDS and for suitable vacancies in the Organization. On 1 June 1995 the Director of the Division of Personnel forwarded to the Organization's senior officers a "List of GPA/WHO Professional staff available for reassignment" - there were 87 - together with a one-page curriculum vitae for each of them. On 20 June 1995 he forwarded to the Legal Counsel a "List of GPA/WHO General Service staff available for reassignment", of whom there were 35 and for each of whom he again appended a one-page curriculum vitae.

4. The closure of GPA led to the displacement of 242 staff, of whom 131 were at headquarters. To make matters worse, it came at a time when, as a result of acceptance of "zero growth" in the Organization's regular budget, 167 of its posts, some of which were vacant, had to be abolished anyway.

5. Notwithstanding the difficulties the Organization made efforts to reassign staff, to arrange for early retirement and mutually-agreed separation in suitable cases and to obtain employment elsewhere for the GPA staff. But it still had to carry out a "reduction-in-force" exercise for 27 staff who in its opinion held posts of indefinite duration or who had career service appointments. It granted all former GPA staff a terminal indemnity equivalent to at least three months' pay whether or not they were so entitled under the Staff Rules.

6. There are two grounds of complaint:

(a) breach of the provisions governing notice of termination of appointment; and

(b) breach of the procedural requirements applicable in the event of termination on account of abolition of post.

The Tribunal will take up (b) first.

The duration of the complainant's post

7. The fundamental issue in this case is whether the post which the complainant occupied was of indefinite duration, as she contends, or of limited duration, as the Organization maintains. The Tribunal has already

had occasion to determine whether a post is of indefinite or limited duration: see, for example, Judgments 470 (*in re* Perrone), 515 (*in re* Vargas), 891 (*in re* Morris) and 974 (*in re* Birendar Singh). In considering that issue a distinction must be drawn between the duration of the post and the duration of the appointment of the incumbent. It is a distinction that the Tribunal drew in Judgment 974.

8. The WHO argues that the reasoning in those judgments has ceased to apply because Staff Rule 1050.6 was amended as from 1 January 1989 to lay down definitions of duration. It now reads:

> "Posts of indefinite duration comprise those that continue in existence unless and until an express decision is taken to abolish them. Posts of limited duration automatically lapse at the end of the period for which they were established unless an express decision is taken to continue them. The Director-General shall determine the categories of posts falling within each of the above two definitions."

9. Other material rules include Manual paragraph II.9.260, which came into force on 20 September 1989 and which reads:

> "Reduction-in-force provisions do not apply to posts of limited duration; incumbents of such posts are not affected by these provisions and cannot benefit from them. Posts of limited duration automatically lapse at the end of the period for which they were established unless an express decision is taken to continue them. This period is specified in the relevant authorized position lists or programme budget proposals and also in vacancy notices and post descriptions. Posts of limited duration include:
>
> 260.1 posts financed from non-regular budget funds located either at Headquarters or at a regional office;
>
> 260.2 inter-regional or inter-country project posts;
>
> 260.3 country project posts, irrespective of the source of funds;
>
> 260.4 posts financed from the regular budget that have been expressly established for a specific period."

10. The procedure for the establishment and abolition of posts is set out in Section III.3 of the Manual. That provision has undergone many amendments since 1985; thus until 1991 a request for the establishment of a post had to be addressed to the Director of Personnel, and over the years some departments have changed names: for example, the Office of Administrative Management and Evaluation has become the Office of Staff and Management Development. But the basic procedure remains

the same. The version dated 15 April 1991 of Section III.3 provides in paragraph 40:

> "Requests for the establishment or abolition of posts are addressed to Chief Budget in the first instance for review and advice as to availability of funding. The requests are then sent to the Director of Personnel who makes a preliminary review and transmits the request to the Office of Administrative Management and Evaluation for review and analysis. Administrative Management and Evaluation, if this appears necessary, obtains the observations of appropriate units at headquarters. Budget is responsible for consolidating the comments into a proposal for presentation together with the request to the Director-General and for notifying those concerned of the Director-General's decision."

The request is to be entered in form 171 ("Authorized position request") and a description of the post to be attached on form 81 ("Post description"). Again according to Section III.3, the Budget unit reviews the request so as to determine:

> "90.1 the date from which the post could be covered;
> 90.2 the funding during the current financial period;
> 90.3 the effect on subsequent financial periods and on the budget;
> 90.4 any other implications resulting from the establishment of the post."

Lastly, the same section states in paragraph 130:

> "The Director-General takes a decision on the request and returns the documents to Budget. The decision and any significant comments or recommendations, including the effective date if the request is approved, are conveyed by Budget on form WHO 172, Notification of Decision on Position Request, to the originator of the request, with a copy to Personnel."

11. The Organization submits that the category in which the complainant's post fell is to be determined solely by reference to Rule 1050.6 (see 8 above) and to Manual paragraph II.9.260 (see 9 above). Though acknowledging that neither vacancy notice nor post description contained any statement about the duration of the post, it argues that "no Organizational 'state of mind' can be inferred from the absence of information on these forms". It concedes that form 172 may describe some posts as "indefinite, subject to continued need and availability of funds" and others as "time-limited posts for period of two years from date of recruitment, extension of post subject to continued need and availability of funds". But – it argues – that form is "not the fundamental document that

establishes whether a staff member's post is of limited or indefinite duration". It points out that the form was last updated in 1986, i.e. before the amendment of Rule 1050.6 and Manual paragraph II.9.260, and was not issued in pursuance of those provisions and that, besides, Budget used the term "indefinite" solely for its own purposes.

12. In answer to a query from the Division of Personnel about form 172 the chief of Budget stated in a memorandum dated 21 September 1995 that his unit did not give the terms "limited" and "indefinite" the same meaning as did Staff Rule 1050 and Manual paragraphs II.9.255 to 260. He explained that when the form "gives the Programme Manager our indication that the post is being established" as "indefinite", the meaning the word bore was the following:

> "The funding attached to the post is not time-limited and emanates from an unspecified source with some continuity, such as the regular budget (irrespective of location) or the unspecified part of the funds for some of the major extrabudgetary-funded programmes like ... GPA and posts financed from the Special Account for Servicing Costs. ..."

13. The Organization cites Judgment 1526 (*in re* Baigrie) on a case in which the complainant had produced form 172 as evidence of the nature of her post. But the issues in that case were whether failure to inform an applicant for employment that a post was of limited duration constituted breach of good faith and whether the Organization had ignored the staff member's rightful expectation of extension. The interpretation to be put on Rule 1050.6 and Manual paragraph II.9.260 and the legal effect of form 172 were not at issue. So Judgment 1526 affords no guidance on the material issues in the present case.

14. The sending of form 172 is an integral part of the procedure prescribed in Section III.3 of the Manual for the establishment of a post in the Organization and what the form says affords evidence of the nature of the created post both for budgetary and for personnel purposes. In this case the form refers to the creation of an "indefinite" post. Moreover, the Tribunal does not construe the phrase "subject to continued need and availability of funds", which appear on the form, as a term of limitation. Where a post is "time-limited" the phrase is used to indicate the basis upon which action may be taken to extend the duration of a post; and where the post is "indefinite" it means that the post will continue until a decision is

taken to abolish it either because there is no further need for it or because funds are no longer available.

15. In construing Rule 1050.6 and Manual paragraph II.9.260 the Tribunal will apply the principle that Judgment 470 declared under 3(d):

> "The relationship between Organization and staff is governed by the Staff Regulations, the Staff Rules and the Manual. The Regulations are supplemented by the Rules, which are elaborated on in the Manual. There is therefore a hierarchy under which the Rules may not derogate from the Regulations, nor the Manual from the Rules."

If a post established by the Organization does not fall within the definition of "limited duration" in Rule 1050.6, that is conclusive notwithstanding any provision of the Manual. Even a post initially established as "time-limited" for a period of two years from the date of recruitment will become a post of unlimited duration if, on the expiry of that period, it is extended without any limit of duration. The definitions in Rule 1050.6 are not in conflict but wholly consonant with the case law. In Judgment 515 the Tribunal declared:

> "A post is of limited duration if the instrument which creates it or controls its length prescribes for it a fixed period, whether long or short. If there is no such prescription, the post is of indefinite duration, whether it is expected to last a long or a short time. ..."

That ruling holds good. There is no conflict between 1050.6 and Manual paragraph II.9.260 because the latter requires that "This period [viz. the period for which the posts were established] is specified in the relevant authorized position lists or programme budget proposals and also in vacancy notices and post descriptions". The Manual paragraph does not create a new category of posts separate and distinct from those described in 1050.6. What it does is identify according to the source of funding posts that will qualify as ones of limited duration provided that they meet the requirements of the paragraph as to notification and the requirements of 1050.6 as to limit of duration.

16. Staff Rule 1050.2 reads:

> "When a post of indefinite duration - or any post held by a staff member with a career-service appointment - comes to an end, a reduction in force shall (if the post was filled) take place, in accordance with procedures established by the Director-General ..."

The complainant held a post of indefinite duration. On its abolition 1050.2 applied and the completion of the reduction-in-force procedure became a condition precedent to any decision to terminate her appointment, the object of the Rule being the retention of staff who, on the strength of past performance and seniority, deserve "priority for retention". As was held in Judgment 1045 (*in re* Mitastein), under 3, notice of termination will be invalid unless the requirements of 1050.2 have been observed. The complainant's plea succeeds.

The abolition of the complainant's post

17. The complainant further contends that, failing evidence of any decision taken by the WHO in accordance with Section III.3 of the Manual to abolish her post, the purported termination of her appointment would be devoid of any legal basis.

18. The Organization retorts in its surrejoinder:

> "No 'decision' was taken in accordance with the procedures described under Part III of the Manual when the complainant's post was abolished, since these procedures would have served no functional purpose. ... that decision had already been taken by the highest Organisational authority, the World Health Assembly."

19. The Tribunal observes that the Assembly's resolution on the establishment of UNAIDS makes no mention of the abolition of posts under the Organization's own GPA. That some decision was taken to abolish the GPA posts is clear; there are, after all, constant references to it in the letters and notices exhibited. Yet since employment in the Organization is governed by individual contracts of appointment to individual posts, a specific decision to abolish the post was necessary. On the Organization's own admission none was taken. The complainant's plea again succeeds.

20. Since the complainant succeeds on the grounds stated above it is not necessary to entertain her plea about breach of the provisions governing notice of termination.

Relief

21. By way of relief the complainant seeks (1) the setting aside of the notice of termination of her appointment; (2) reinstatement as from 1 January 1996 and payment of salary, allowances and all other benefits due

under her previous conditions of employment, plus interest thereon at such rate as the Tribunal may set, subject to deduction of any termination indemnities and occupational earnings received by her between 1 January 1996 and the actual date of reinstatement. She cites Judgments 1045, 1371 (*in re* Ortiz) and 1374 (*in re* González and others) in support of her contention that in the absence of valid notice of termination a fixed-term contract is renewed by implication.

22. The WHO submits that, if the Tribunal allowed this and the similar complaints, any relief it granted should strike an appropriate balance between providing fair and reasonable compensation and recognition of the potentially heavy financial burden the Organization would have to bear if all the complainants were, say, reinstated. It points out that twenty-nine former staff of the GPA have filed similar internal appeals and that over two hundred such staff may apply to intervene in the complaints. It concludes that, if the complaint were upheld, the Tribunal should, instead of ordering reinstatement, have the Organization proceed directly to a reduction-in-force exercise. It cites Judgment 891 (*in re* Morris) in support of its view that that exercise may be carried out in the absence of reinstatement.

23. In the case that Judgment 891 ruled on the issue was whether the abolished post was of indefinite or limited duration. The Tribunal held that the post, having started as one of limited duration, had become an indefinite one on extension and that the complainant was therefore entitled to the application of the reduction-in-force procedure. Though he had applied for reinstatement for the purpose of carrying out the procedure, the Tribunal held that that was not necessary: the Organization could go through the procedure without reinstating him. The issues of the invalidity of the notice of termination and the consequences thereof which were raised in Mitastein were not raised in Morris. In Mitastein the invalidity of the notice of termination meant that that complainant's contract was renewed by implication and she was entitled not only to the application of the reduction-in-force procedure but also to payment of the salary and allowances due under her contract less any indemnity or earnings she might have received in the meantime.

24. The present complainant is likewise entitled to reinstatement with payment of salary and allowances and benefits due under her contract less any indemnity or earnings she may have received or receive until either her

appointment is terminated after completion of the reduction-in-force procedure or she is redeployed under that procedure.

25. In view, however, of the recent decimation of posts in the WHO the Tribunal offers the Organization the alternative option of paying the complainant damages equal to the amounts payable under 24 above — without actually reinstating her in a post commensurate with her grade and experience — and of carrying out the procedure under the same conditions.

26. The complainant is entitled to the payment of interest on the sums due at the rate of 8 per cent a year from the due dates and to an award of costs.

DECISION

1. The impugned decision is set aside.
2. The Organization shall either reinstate the complainant as set out in 24 or pay her damages as set out in 25.
3. It shall apply to her the reduction-in-force procedure.
4. It shall pay her interest at the rate of 8 per cent a year on the sums due.
5. It shall pay her 2,000 Swiss francs in costs.
6. All her other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

W. Douglas

WILLIAM DOUGLAS

Mella Carroll

MELLA CARROLL

MARK FERNANDO

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-THIRD SESSION

***In re* Sato** **Judgment 1628**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Paul Akibumi Sato against the World Health Organization (WHO) on 21 June 1996, the WHO's reply of 23 September, the complainant's rejoinder of 25 November 1996 and the Organization's surrejoinder of 28 February 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of Japan and the United States, was first employed by the WHO in July 1987 as a consultant. In July 1988 he got a short-term appointment under the Global Programme on AIDS (GPA) as a technical officer at grade P.3. Another short-term appointment followed as a medical officer under the Programme at grade P.4. In September 1989 he was granted a two-year fixed-term appointment on a post - No. 1.3637 - as an epidemiologist with the Programme at the same grade. In form 172, "Notification of decision on position request", which the chief of Budget signed on 14 February 1989, the Administration had described his post as "indefinite, subject to continued need and availability of funds". In 1992 he took up a post - No. 1.3883 - as a scientist under the GPA and still at P.4. By a decision of 2 December 1991 the Administration had approved that post too as "indefinite, subject to continued need and availability of funds". The Organization extended his appointment by two years in 1993, by four months in 1995, from 1 September to 31 December, and then for six months in 1996, from 1 January to 30 June, when he was seconded to the United Nations Programme on HIV/AIDS (UNAIDS) .

In a letter dated 26 September 1995, a senior officer of the Division of Personnel told him that the Organization had decided to terminate his appointment under Staff Rule 1050.5, which is about the termination of the appointment of a staff member who has at least 5 years' satisfactory service in the Organization on account of abolition or intended abolition of post; termination was to take effect at 31 December 1995, when his post was "scheduled for abolition" for want of funding. On 15 November 1995 he gave the headquarters Board of Appeal notice of appeal against termination.

By a letter of 19 March 1996 an Assistant Director-General told the chairman of the Staff Committee that the Director-General was willing to give former staff of the Programme leave to go directly to the Tribunal. On 28 May 1996 the complainant informed the headquarters Board that he was withdrawing his appeal.

B. The complainant submits that the decision to terminate his appointment was unlawful. He alleges breach of formal requirements about notice of termination in the WHO Manual and failure to carry out the "reduction-in-force procedure" required under Staff Rule 1050.2, on termination due to abolition of a post of indefinite duration.

He seeks the quashing of the notice of termination in the letter of 26 September 1995 and reinstatement as from 1 January 1996 with payment, plus interest, of all entitlements due from that date, less any occupational earnings he may have had up to the actual date of reinstatement. He claims 4,000 Swiss francs in costs.

C. In its reply the WHO says that it treated him fairly and in full compliance with the rules. The Manual provision he relies on does not apply to his case. Nor was he entitled to a reduction-in-force procedure under Rule 1050.2. Since he had more than five years' satisfactory service it was proper to terminate his appointment under Rule 1050.5, which gave him the benefit of the indemnity set out under 1050.4. In any event the Organization did its utmost to find other employment for him. If the Tribunal ruled in his favour, the application of the reduction-in-force procedure would be a more appropriate remedy than reinstatement.

D. In his rejoinder the complainant rebuts the Organization's pleas and enlarges on his own. He presses his claims.

E. In its surrejoinder the WHO maintains that it met the "essential" requirements of the material provisions in the Manual and that there was no call to apply the reduction-in-force procedure to the complainant's case.

CONSIDERATIONS

1. The complainant joined the Organization as a consultant in 1987. In 1989 it appointed him as epidemiologist at grade P.4 under the Global Programme on AIDS (GPA) under a two-year contract, which it later extended to 31 August 1993. In 1992 it transferred him to a post for a scientist under the GPA, No. 1.3883, which had been established on 2 December 1991 as "indefinite, subject to continued need and availability of funds" according to form 172 ("Notification of decision on position request"). In May 1993 it extended his contract by another two years, until 31 August 1995. At a meeting on 17 November 1994 the Executive Director of the GPA told him that, owing to a shortfall in extra-budgetary contributions to the Programme, his contract would not be renewed. By a memorandum dated 16 May 1995 the chief of the Administration and Staff Support Service gave him notice that, failing reassignment, his appointment would end at 31 August 1995 in accordance with Staff Rule 1050.5. That rule reads:

> "The appointment of a staff member who has satisfactorily served the Organization for five years or more shall be considered as having been terminated under this Rule if the appointment was not renewed because of the abolition or intended abolition of a post."

On 15 November 1995 the complainant gave notice of appeal against the decision to terminate his appointment. There were two further extensions of his contract, to 31 December 1995 and then to 30 June 1996, the latter on the understanding that, failing some reassignment, his appointment would end once and for all at that date. He was seconded to the United Nations programme on HIV/AIDS (UNAIDS) from 1 January to 30 June 1996. By agreement between the parties the case has been submitted directly to the Tribunal.

2. The background to the dispute is that, after discussion with other international bodies that were to offer sponsorship, the Economic and Social Council of the United Nations adopted in July 1994 resolution 1994/24 approving the establishment of a joint and co-sponsored United Nations Programme on HIV/AIDS (UNAIDS). In May 1995 the 48th World Health

Assembly adopted a resolution of its own in which it endorsed the establishment of UNAIDS —"to which WHO will provide the administrative framework" — and asked the Director-General to "arrange for WHO to meet the administrative needs of the Programme once it is operational, in the light of the Organization's role as administering agency". The new Programme was to become "operational" by 1 January 1996.

3. By a memorandum of 6 March 1995 the Executive Director of the GPA informed all its staff at headquarters that it would cease to exist at 31 December 1995 and that the Division of Personnel would in due course be giving advice on each staff member's contractual position. He encouraged all the staff to apply for positions in UNAIDS and for suitable vacancies in the Organization. On 1 June 1995 the Director of the Division of Personnel forwarded to the Organization's senior officers a "List of GPA/WHO Professional staff available for reassignment" — there were 87 — together with a one-page curriculum vitae for each of them. On 20 June 1995 he forwarded to the Legal Counsel a "List of GPA/WHO General Service staff available for reassignment", of whom there were 35 and for each of whom he again appended a one-page curriculum vitae.

4. The closure of GPA led to the displacement of 242 staff, of whom 131 were at headquarters. To make matters worse, it came at a time when, as a result of acceptance of "zero growth" in the Organization's regular budget, 167 of its posts, some of which were vacant, had to be abolished anyway.

5. Notwithstanding the difficulties the Organization made efforts to reassign staff, to arrange for early retirement and mutually-agreed separation in suitable cases and to obtain employment elsewhere for the GPA staff. But it still had to carry out a "reduction-in-force" exercise for 27 staff who in its opinion held posts of indefinite duration or who had career service appointments. It granted all former GPA staff a terminal indemnity equivalent to at least three months' pay whether or not they were so entitled under the Staff Rules.

6. There are two grounds of complaint:

(a) breach of the provisions governing notice of termination of appointment; and

(b) breach of the procedural requirements applicable in the event of termination on account of abolition of post.

The Tribunal will take up (b) first.

The duration of the complainant's post

7. The fundamental issue in this case is whether the post which the complainant occupied was of indefinite duration, as he contends, or of limited duration, as the Organization maintains. The Tribunal has already had occasion to determine whether a post is of indefinite or limited duration: see, for example, Judgments 470 (*in re* Perrone), 515 (*in re* Vargas), 891 (*in re* Morris) and 974 (*in re* Birendar Singh). In considering that issue a distinction must be drawn between the duration of the post and the duration of the appointment of the incumbent. It is a distinction that the Tribunal drew in Judgment 974.

8. The WHO argues that the reasoning in those judgments has ceased to apply because Staff Rule 1050.6 was amended as from 1 January 1989 to lay down definitions of duration. It now reads:

> "Posts of indefinite duration comprise those that continue in existence unless and until an express decision is taken to abolish them. Posts of limited duration automatically lapse at the end of the period for which they were established unless an express decision is taken to continue them. The Director-General shall determine the categories of posts falling within each of the above two definitions."

9. Other material rules include Manual paragraph II.9.260, which came into force on 20 September 1989 and which reads:

> "Reduction-in-force provisions do not apply to posts of limited duration; incumbents of such posts are not affected by these provisions and cannot benefit from them. Posts of limited duration automatically lapse at the end of the period for which they were established unless an express decision is taken to continue them. This period is specified in the relevant authorized position lists or programme budget proposals and also in vacancy notices and post descriptions. Posts of limited duration include:
>
> 260.1 posts financed from non-regular budget funds located either at Headquarters or at a regional office;
>
> 260.2 inter-regional or inter-country project posts;
>
> 260.3 country project posts, irrespective of the source of funds;
>
> 260.4 posts financed from the regular budget that have been expressly established for a specific period."

10. The procedure for the establishment and abolition of posts is set out in Section III.3 of the Manual. That provision has undergone many amendments since 1985; thus until 1991 a request for the establishment of a post had to be addressed to the Director of Personnel, and over the years some departments have changed names: for example, the Office of

Administrative Management and Evaluation has become the Office of Staff and Management Development. But the basic procedure remains the same. The version dated 15 April 1991 of Section III.3 provides in paragraph 40:

> "Requests for the establishment or abolition of posts are addressed to Chief Budget in the first instance for review and advice as to availability of funding. The requests are then sent to the Director of Personnel who makes a preliminary review and transmits the request to the Office of Administrative Management and Evaluation for review and analysis. Administrative Management and Evaluation, if this appears necessary, obtains the observations of appropriate units at headquarters. Budget is responsible for consolidating the comments into a proposal for presentation together with the request to the Director-General and for notifying those concerned of the Director-General's decision."

The request is to be entered in form 171 ("Authorized position request") and a description of the post to be attached on form 81 ("Post description"). Again according to Section III.3, the Budget unit reviews the request so as to determine:

> "90.1 the date from which the post could be covered;
>
> 90.2 the funding during the current financial period;
>
> 90.3 the effect on subsequent financial periods and on the budget;
>
> 90.4 any other implications resulting from the establishment of the post."

Lastly, the same section states in paragraph 130:

> "The Director-General takes a decision on the request and returns the documents to Budget. The decision and any significant comments or recommendations, including the effective date if the request is approved, are conveyed by Budget on form WHO 172, Notification of Decision on Position Request, to the originator of the request, with a copy to Personnel."

11. The Organization submits that the category in which the complainant's post fell is to be determined solely by reference to Rule 1050.6 (see 8 above) and to Manual paragraph II.9.260 (see 9 above). Though acknowledging that neither vacancy notice nor post description contained any statement about the duration of the post, it argues that "no Organizational 'state of mind' can be inferred from the absence of information on these forms". It concedes that form 172 may describe some posts as "indefinite, subject to continued need and availability of funds" and others as "time-limited posts for period of two years from date of recruitment, extension of post subject to continued need and availability of

funds". But — it argues — that form is "not the fundamental document that establishes whether a staff member's post is of limited or indefinite duration". It points out that the form was last updated in 1986, i.e. before the amendment of Rule 1050.6 and Manual paragraph II.9.260, and was not issued in pursuance of those provisions and that, besides, Budget used the term "indefinite" solely for its own purposes.

12. In answer to a query from the Division of Personnel about form 172 the chief of Budget stated in a memorandum dated 21 September 1995 that his unit did not give the terms "limited" and "indefinite" the same meaning as did Staff Rule 1050 and Manual paragraphs II.9.255 to 260. He explained that when the form "gives the Programme Manager our indication that the post is being established" as "indefinite", the meaning the word bore was the following:

> "The funding attached to the post is not time-limited and emanates from an unspecified source with some continuity, such as the regular budget (irrespective of location) or the unspecified part of the funds for some of the major extrabudgetary-funded programmes like ... GPA and posts financed from the Special Account for Servicing Costs. ..."

13. The Organization cites Judgment 1526 (*in re* Baigrie) on a case in which the complainant had produced form 172 as evidence of the nature of her post. But the issues in that case were whether failure to inform an applicant for employment that a post was of limited duration constituted breach of good faith and whether the Organization had ignored the staff member's rightful expectation of extension. The interpretation to be put on Rule 1050.6 and Manual paragraph II.9.260 and the legal effect of form 172 were not at issue. So Judgment 1526 affords no guidance on the material issues in the present case.

14. The sending of form 172 is an integral part of the procedure prescribed in Section III.3 of the Manual for the establishment of a post in the Organization and what the form says affords evidence of the nature of the created post both for budgetary and for personnel purposes. In this case the form refers to the creation of an "indefinite" post. Moreover, the Tribunal does not construe the phrase "subject to continued need and availability of funds", which appear on the form, as a term of limitation. Where a post is "time-limited" the phrase is used to indicate the basis upon

which action may be taken to extend the duration of a post; and where the post is "indefinite" it means that the post will continue until a decision is taken to abolish it either because there is no further need for it or because funds are no longer available.

15. In construing Rule 1050.6 and Manual paragraph II.9.260 the Tribunal will apply the principle that Judgment 470 declared under 3(d):

> "The relationship between Organization and staff is governed by the Staff Regulations, the Staff Rules and the Manual. The Regulations are supplemented by the Rules, which are elaborated on in the Manual. There is therefore a hierarchy under which the Rules may not derogate from the Regulations, nor the Manual from the Rules."

If a post established by the Organization does not fall within the definition of "limited duration" in Rule 1050.6, that is conclusive notwithstanding any provision of the Manual. Even a post initially established as "time-limited" for a period of two years from the date of recruitment will become a post of unlimited duration if, on the expiry of that period, it is extended without any limit of duration. The definitions in Rule 1050.6 are not in conflict but wholly consonant with the case law. In Judgment 515 the Tribunal declared:

> "A post is of limited duration if the instrument which creates it or controls its length prescribes for it a fixed period, whether long or short. If there is no such prescription, the post is of indefinite duration, whether it is expected to last a long or a short time. ..."

That ruling holds good. There is no conflict between 1050.6 and Manual paragraph II.9.260 because the latter requires that "This period [viz. the period for which the posts were established] is specified in the relevant authorized position lists or programme budget proposals and also in vacancy notices and post descriptions". The Manual paragraph does not create a new category of posts separate and distinct from those described in 1050.6. What it does is identify according to the source of funding posts that will qualify as ones of limited duration provided that they meet the requirements of the paragraph as to notification and the requirements of 1050.6 as to limit of duration.

16. Staff Rule 1050.2 reads:

> "When a post of indefinite duration - or any post held by a staff member with a career-service appointment - comes to an end, a reduction in force shall (if the post was filled) take place, in accordance with procedures established by the Director-General ..."

The complainant held a post of indefinite duration. On its abolition 1050.2 applied and the completion of the reduction-in-force procedure became a condition precedent to any decision to terminate her appointment, the object of the Rule being the retention of staff who, on the strength of past performance and seniority, deserve "priority for retention". As was held in Judgment 1045 (*in re* Mitastein), under 3, notice of termination will be invalid unless the requirements of 1050.2 have been observed. The complainant's plea succeeds.

The abolition of the complainant's post

17. The complainant further contends that, failing evidence of any decision taken by the WHO in accordance with Section III.3 of the Manual to abolish his post, the purported termination of his appointment would be devoid of any legal basis.

18. The Organization retorts in its surrejoinder:

> "No 'decision' was taken in accordance with the procedures described under Part III of the Manual when the complainant's post was abolished, since these procedures would have served no functional purpose. ... that decision had already been taken by the highest Organisational authority, the World Health Assembly."

19. The Tribunal observes that the Assembly's resolution on the establishment of UNAIDS makes no mention of the abolition of posts under the Organization's own GPA. That some decision was taken to abolish the GPA posts is clear; there are, after all, constant references to it in the letters and notices exhibited. Yet since employment in the Organization is governed by individual contracts of appointment to individual posts, a specific decision to abolish the post was necessary. On the Organization's own admission none was taken. The complainant's plea again succeeds.

20. Since the complainant succeeds on the grounds stated above it is not necessary to entertain his plea about breach of the provisions governing notice of termination.

Relief

21. By way of relief the complainant seeks (1) the setting aside of the notice of termination of his appointment; (2) reinstatement as from 1 January 1996 and payment of salary, allowances and all other benefits due under his

previous conditions of employment, plus interest thereon at such rate as the Tribunal may set, subject to deduction of any termination indemnities and occupational earnings received by him between 1 January 1996 and the actual date of reinstatement. He cites Judgments 1045, 1371 (*in re* Ortiz) and 1374 (*in re* González and others) in support of his contention that in the absence of valid notice of termination a fixed-term contract is renewed by implication.

22. The WHO submits that, if the Tribunal allowed this and the similar complaints, any relief it granted should strike an appropriate balance between providing fair and reasonable compensation and recognition of the potentially heavy financial burden the Organization would have to bear if all the complainants were, say, reinstated. It points out that twenty-nine former staff of the GPA have filed similar internal appeals and that over two hundred such staff may apply to intervene in the complaints. It concludes that, if the complaint were upheld, the Tribunal should, instead of ordering reinstatement, have the Organization proceed directly to a reduction-in-force exercise. It cites Judgment 891 (*in re* Morris) in support of its view that that exercise may be carried out in the absence of reinstatement.

23. In the case that Judgment 891 ruled on the issue was whether the abolished post was of indefinite or limited duration. The Tribunal held that the post, having started as one of limited duration, had become an indefinite one on extension and that the complainant was therefore entitled to the application of the reduction-in-force procedure. Though he had applied for reinstatement for the purpose of carrying out the procedure, the Tribunal held that that was not necessary: the Organization could go through the procedure without reinstating him. The issues of the invalidity of the notice of termination and the consequences thereof which were raised in Mitastein were not raised in Morris. In Mitastein the invalidity of the notice of termination meant that that complainant's contract was renewed by implication and she was entitled not only to the application of the reduction-in-force procedure but also to payment of the salary and allowances due under her contract less any indemnity or earnings she might have received in the meantime.

24. The present complainant is likewise entitled to reinstatement with payment of salary and allowances and benefits due under his contract less any indemnity or earnings he may have received or receive until either his

appointment is terminated after completion of the reduction-in-force procedure or he is redeployed under that procedure.

25. In view, however, of the recent decimation of posts in the WHO the Tribunal offers the Organization the alternative option of paying the complainant damages equal to the amounts payable under 24 above — without actually reinstating him in a post commensurate with his grade and experience — and of carrying out the procedure under the same conditions.

26. The complainant is entitled to the payment of interest on the sums due at the rate of 8 per cent a year from the due dates and to an award of costs.

DECISION

1. The impugned decision is set aside.
2. The Organization shall either reinstate the complainant as set out in 24 or pay him damages as set out in 25.
3. It shall apply to him the reduction-in-force procedure.
4. It shall pay him interest at the rate of 8 per cent a year on the sums due.
5. It shall pay him 2,000 Swiss francs in costs.
6. All his other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

Wm Douglas

WILLIAM DOUGLAS

Mella Carroll

MELLA CARROLL

MARK FERNANDO

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL GENEVA availability of funds". The complainant had her appointment extended by two years in 1994.

In a letter dated 26 September 1995 a senior officer of the Division of Personnel told her that the Organization had decided to terminate her appointment under Staff Rule 1050.1 at 31 December 1995, when her post was "scheduled for abolition" for want of funding. On 22 November 1995 she gave the headquarters Board of Appeal notice of appeal against termination.

By a letter of 19 March 1996 an Assistant Director-General informed the chairman of the Staff Committee that the Director-General was willing to give former staff of the Programme leave to go directly to the Tribunal. On 28 May 1996 the complainant told the headquarters Board that she was withdrawing her appeal.

B. The complainant submits that the decision to terminate her appointment was unlawful. She alleges breach of formal requirements about notice of termination in the WHO Manual and failure to carry out the "reduction-in-force procedure" required under Staff Rule 1050.2, which is about termination due to abolition of a post of indefinite duration.

She seeks the quashing of the notice of termination in the letter of 26 September 1995 and reinstatement as from 1 January 1996 with payment, plus interest, of all entitlements due from that date less any occupational earnings she may have had up to the actual date of reinstatement. She claims 4,000 Swiss francs in costs.

C. In its reply the WHO says that it treated her fairly and in full compliance with the rules. The Manual provision she relies on does not apply to her case. Nor was she entitled to a reduction-in-force procedure under Rule 1050.2: her post being one of limited, not indefinite, duration, the material rule is 1050.1. In any event the Organization did its utmost to find other employment for her. If the Tribunal ruled in her favour, the application of the reduction-in-force procedure would be a more appropriate remedy than reinstatement.

D. In her rejoinder the complainant rebuts the Organization's pleas and enlarges on her own. She presses her claims.

E. In its surrejoinder the WHO maintains that it met the "essential" requirements of the material provisions in the Manual and that there was no call to apply the reduction-in-force procedure to the complainant's case.

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-THIRD SESSION

In re Schopper

Judgment 1629

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Doris Schopper against the World Health Organization (WHO) on 5 May 1996, the WHO's reply of 6 September, the complainant's rejoinder of 25 November 1996 and the Organization's surrejoinder of 28 February 1997;

Considering the applications to intervene filed by

A.S. Abdul-Quader
D.L. Appiah Agbogla
B. Baigrie
C.D. Betts
P. Bevin
M. Adoley Brown
P.G. Friel
C.A. Gregory
Z.H.M. Najjar
C. Norton
M. Sinnott
R.J. Voetsch
M.M. Wernette
M. Youssef

and the Organization's observations thereon of 4 and 28 April and 7 and 13 May 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who is Swiss, joined the staff of the WHO in November 1992 under a two-year fixed-term appointment on a post — No. 1.3862 — for a scientist at grade P.5 under the Global Programme on AIDS (GPA). In form 172 "Notification of decision on position request", which the chief of Budget signed on 10 September 1991, the Administration had described post 1.3862 as "indefinite, subject to continued need and

CONSIDERATIONS

1. The complainant joined the Organization on 9 November 1992 as a scientist in the Planning and Policy Co-ordination Unit of its Global Programme on AIDS (GPA) at grade P.5. Her initial two-year fixed-term appointment was renewed and was to expire at 8 November 1996. Her post No. 1.3862 was established on 10 September 1991 as "indefinite, subject to continued need and availability of funds" according to form 172 ("Notification of decision on position request"). By a letter dated 26 September 1995 the chief of Contract Administration and Information, in the Division of Personnel, told her that funding for her post would cease, and the post itself would be abolished, at 31 December 1995 and that her appointment would terminate on that date in accordance with Staff Rule 1050.1. That rule reads:

> "The temporary appointment of a staff member engaged for a post of limited duration may be terminated prior to its expiration date if the post is abolished."

On 22 November 1995 the complainant gave notice of appeal against the decision to terminate her appointment and by agreement between the parties the case has been submitted directly to the Tribunal.

2. The background to the dispute is that, after discussion with other international bodies that were to offer sponsorship, the Economic and Social Council of the United Nations adopted in July 1994 resolution 1994/24 approving the establishment of a joint and co-sponsored United Nations programme on HIV/AIDS (UNAIDS). In May 1995 the 48th World Health Assembly adopted a resolution of its own in which it endorsed the establishment of UNAIDS — "to which WHO will provide the administrative framework" — and asked the Director-General to "arrange for WHO to meet the administrative needs of the Programme once it is operational, in the light of the Organization's role as administering agency". The new Programme was to become "operational" by 1 January 1996.

3. By a memorandum of 6 March 1995 the Executive Director of the GPA informed all its staff at headquarters that it would cease to exist at 31 December 1995 and that the Division of Personnel would in due course be giving advice on each staff member's contractual position. He encouraged all the staff to apply for positions in UNAIDS and for suitable vacancies in the Organization. On 1 June 1995 the Director of the Division of Personnel forwarded to the Organization's senior officers a "List of GPA/WHO Professional staff available for reassignment" — there were 87

— together with a one-page curriculum vitae for each of them. On 20 June 1995 he forwarded to the Legal Counsel a "List of GPA/WHO General Service staff available for reassignment", of whom there were 35 and for each of whom he again appended a one-page curriculum vitae.

4. The closure of GPA led to the displacement of 242 staff, of whom 131 were at headquarters. To make matters worse, it came at a time when, as a result of acceptance of "zero growth" in the Organization's regular budget, 167 of its posts, some of which were vacant, had to be abolished anyway.

5. Notwithstanding the difficulties the Organization made efforts to reassign staff, to arrange for early retirement and mutually-agreed separation in suitable cases and to obtain employment elsewhere for the GPA staff. But it still had to carry out a "reduction-in-force" exercise for 27 staff who in its opinion held posts of indefinite duration or who had career service appointments. It granted all former GPA staff a terminal indemnity equivalent to at least three months' pay whether or not they were so entitled under the Staff Rules.

6. There are two grounds of complaint:

(a) breach of the provisions governing notice of termination of appointment; and

(b) breach of the procedural requirements applicable in the event of termination on account of abolition of post.

The Tribunal will take up (b) first.

The duration of the complainant's post

7. The fundamental issue in this case is whether the post which the complainant occupied was of indefinite duration, as she contends, or of limited duration, as the Organization maintains. The Tribunal has already had occasion to determine whether a post is of indefinite or limited duration: see, for example, Judgments 470 (*in re* Perrone), 515 (*in re* Vargas), 891 (*in re* Morris) and 974 (*in re* Birendar Singh). In considering that issue a distinction must be drawn between the duration of the post and the duration of the appointment of the incumbent. It is a distinction that the Tribunal drew in Judgment 974.

8. The WHO argues that the reasoning in those judgments has ceased to apply because Staff Rule 1050.6 was amended as from 1 January 1989 to lay down definitions of duration. It now reads:

> "Posts of indefinite duration comprise those that continue in existence unless and until an express decision is taken to abolish them. Posts of limited duration automatically lapse at the end of the period for which they were established unless an express decision is taken to continue them. The Director-General shall determine the categories of posts falling within each of the above two definitions."

9. Other material rules include Manual paragraph II.9.260, which came into force on 20 September 1989 and which reads:

> "Reduction-in-force provisions do not apply to posts of limited duration; incumbents of such posts are not affected by these provisions and cannot benefit from them. Posts of limited duration automatically lapse at the end of the period for which they were established unless an express decision is taken to continue them. This period is specified in the relevant authorized position lists or programme budget proposals and also in vacancy notices and post descriptions. Posts of limited duration include:
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10. The procedure for the establishment and abolition of posts is set out in Section III.3 of the Manual. That provision has undergone many amendments since 1985; thus until 1991 a request for the establishment of a post had to be addressed to the Director of Personnel, and over the years some departments have changed names: for example, the Office of Administrative Management and Evaluation has become the Office of Staff and Management Development. But the basic procedure remains the same. The version dated 15 April 1991 of Section III.3 provides in paragraph 40:

> "Requests for the establishment or abolition of posts are addressed to Chief Budget in the first instance for review and advice as to availability of funding. The requests are then sent to the Director of Personnel who makes a preliminary review and transmits the request to the Office of Administrative Management and Evaluation for review and analysis. Administrative Management and Evaluation, if this appears necessary, obtains the observations of appropriate units at headquarters. Budget is responsible for consolidating the comments into a proposal for presentation together with the request to the Director-General and for notifying those concerned of the Director-General's decision."

The request is to be entered in form 171 ("Authorized position request") and a description of the post to be attached on form 81 ("Post description").

Again according to Section III.3, the Budget unit reviews the request so as to determine:

> "90.1 the date from which the post could be covered;
> 90.2 the funding during the current financial period;
> 90.3 the effect on subsequent financial periods and on the budget;
> 90.4 any other implications resulting from the establishment of the post."

Lastly, the same section states in paragraph 130:

> "The Director-General takes a decision on the request and returns the documents to Budget. The decision and any significant comments or recommendations, including the effective date if the request is approved, are conveyed by Budget on form WHO 172, Notification of Decision on Position Request, to the originator of the request, with a copy to Personnel."

11. The Organization submits that the category in which the complainant's post fell is to be determined solely by reference to Rule 1050.6 (see 8 above) and to Manual paragraph II.9.260 (see 9 above). Though acknowledging that neither vacancy notice nor post description contained any statement about the duration of the post, it argues that "no Organizational 'state of mind' can be inferred from the absence of information on these forms". It concedes that form 172 may describe some posts as "indefinite, subject to continued need and availability of funds" and others as "time-limited posts for period of two years from date of recruitment, extension of post subject to continued need and availability of funds". But — it argues — that form is "not the fundamental document that establishes whether a staff member's post is of limited or indefinite duration". It points out that the form was last updated in 1986, i.e. before the amendment of Rule 1050.6 and Manual paragraph II.9.260, and was not issued in pursuance of those provisions and that, besides, Budget used the term "indefinite" solely for its own purposes.

12. In answer to a query from the Division of Personnel about form 172 the chief of Budget stated in a memorandum dated 21 September 1995 that his unit did not give the terms "limited" and "indefinite" the same meaning as did Staff Rule 1050 and Manual paragraphs II.9.255 to 260. He explained that when the form "gives the Programme Manager our indication that the post is being established" as "indefinite", the meaning the word bore was the following:

> "The funding attached to the post is not time-limited and emanates from an unspecified source with some continuity, such as the regular budget (irrespective of location) or the unspecified part of the funds for some of the

> major extrabudgetary-funded programmes like ... GPA and posts financed from the Special Account for Servicing Costs ..."

13. The Organization cites Judgment 1526 (*in re* Baigrie) on a case in which the complainant had produced form 172 as evidence of the nature of her post. But the issues in that case were whether failure to inform an applicant for employment that a post was of limited duration constituted breach of good faith and whether the Organization had ignored the staff member's rightful expectation of extension. The interpretation to be put on Rule 1050.6 and Manual paragraph II.9.260 and the legal effect of form 172 were not at issue. So Judgment 1526 affords no guidance on the material issues in the present case.

14. The sending of form 172 is an integral part of the procedure prescribed in Section III.3 of the Manual for the establishment of a post in the Organization and what the form says affords evidence of the nature of the created post both for budgetary and for personnel purposes. In this case the form refers to the creation of an "indefinite" post. Moreover, the Tribunal does not construe the phrase "subject to continued need and availability of funds", which appear on the form, as a term of limitation. Where a post is "time-limited" the phrase is used to indicate the basis upon which action may be taken to extend the duration of a post; and where the post is "indefinite" it means that the post will continue until a decision is taken to abolish it either because there is no further need for it or because funds are no longer available.

15. In construing Rule 1050.6 and Manual paragraph II.9.260 the Tribunal will apply the principle that Judgment 470 declared under 3(d):

> "The relationship between Organization and staff is governed by the Staff Regulations, the Staff Rules and the Manual. The Regulations are supplemented by the Rules, which are elaborated on in the Manual. There is therefore a hierarchy under which the Rules may not derogate from the Regulations, nor the Manual from the Rules."

If a post established by the Organization does not fall within the definition of "limited duration" in Rule 1050.6, that is conclusive notwithstanding any provision of the Manual. Even a post initially established as "time-limited" for a period of two years from the date of recruitment will become a post of unlimited duration if, on the expiry of that period, it is extended without any limit of duration. The definitions in Rule 1050.6 are not in conflict but wholly consonant with the case law. In Judgment 515 the Tribunal declared:

> "A post is of limited duration if the instrument which creates it or controls its length prescribes for it a fixed period, whether long or short. If there is no such prescription, the post is of indefinite duration, whether it is expected to last a long or a short time. ..."

That ruling holds good. There is no conflict between 1050.6 and Manual paragraph II.9.260 because the latter requires that "This period [viz. the period for which the posts were established] is specified in the relevant authorized position lists or programme budget proposals and also in vacancy notices and post descriptions". The Manual paragraph does not create a new category of posts separate and distinct from those described in 1050.6. What it does is identify according to the source of funding posts that will qualify as ones of limited duration provided that they meet the requirements of the paragraph as to notification and the requirements of 1050.6 as to limit of duration.

16. Staff Rule 1050.2 reads:

> "When a post of indefinite duration - or any post held by a staff member with a career-service appointment - comes to an end, a reduction in force shall (if the post was filled) take place, in accordance with procedures established by the Director-General ..."

The complainant held a post of indefinite duration. On its abolition 1050.2 applied and the completion of the reduction-in-force procedure became a condition precedent to any decision to terminate her appointment, the object of the Rule being the retention of staff who, on the strength of past performance and seniority, deserve "priority for retention". As was held in Judgment 1045 (*in re* Mitastein), under 3, notice of termination will be invalid unless the requirements of 1050.2 have been observed. The complainant's plea succeeds.

The abolition of the complainant's post

17. The complainant further contends that, failing evidence of any decision taken by the WHO in accordance with Section III.3 of the Manual to abolish her post, the purported termination of her appointment would be devoid of any legal basis.

18. The Organization retorts in its surrejoinder:

> "No 'decision' was taken in accordance with the procedures described under Part III of the Manual when the complainant's post was abolished, since these procedures would have served no functional purpose. ... that decision had already been taken by the highest Organisational authority, the World Health Assembly."

19. The Tribunal observes that the Assembly's resolution on the establishment of UNAIDS makes no mention of the abolition of posts under the Organization's own GPA. That some decision was taken to abolish the GPA posts is clear; there are, after all, constant references to it in the letters and notices exhibited. Yet since employment in the Organization is governed by individual contracts of appointment to individual posts, a specific decision to abolish the post was necessary. On the Organization's own admission none was taken. The complainant's plea again succeeds.

20. Since the complainant succeeds on the grounds stated above it is not necessary to entertain her plea about breach of the provisions governing notice of termination.

Relief

21. By way of relief the complainant seeks (1) the setting aside of the notice of termination of her appointment; (2) reinstatement as from 1 January 1996 and payment of salary, allowances and all other benefits due under her previous conditions of employment, plus interest thereon at such rate as the Tribunal may set, subject to deduction of any termination indemnities and occupational earnings received by her between 1 January 1996 and the actual date of reinstatement. She cites Judgments 1045, 1371 (*in re* Ortiz) and 1374 (*in re* González and others) in support of her contention that in the absence of valid notice of termination a fixed-term contract is renewed by implication.

22. The WHO submits that, if the Tribunal allowed this and the similar complaints, any relief it granted should strike an appropriate balance between providing fair and reasonable compensation and recognition of the potentially heavy financial burden the Organization would have to bear if all the complainants were, say, reinstated. It points out that twenty-nine former staff of the GPA have filed similar internal appeals and that over two hundred such staff may apply to intervene in the complaints. It concludes that, if the complaint were upheld, the Tribunal should, instead of ordering reinstatement, have the Organization proceed directly to a reduction-in-force exercise. It cites Judgment 891 (*in re* Morris) in support of its view that that exercise may be carried out in the absence of reinstatement.

23. In the case that Judgment 891 ruled on the issue was whether the abolished post was of indefinite or limited duration. The Tribunal held that the post, having started as one of limited duration, had become an indefinite one on extension and that the complainant was therefore entitled to the application of the reduction-in-force procedure. Though he had applied for

reinstatement for the purpose of carrying out the procedure, the Tribunal held that that was not necessary: the Organization could go through the procedure without reinstating him. The issues of the invalidity of the notice of termination and the consequences thereof which were raised in Mitastein were not raised in Morris. In Mitastein the invalidity of the notice of termination meant that that complainant's contract was renewed by implication and she was entitled not only to the application of the reduction-in-force procedure but also to payment of the salary and allowances due under her contract less any indemnity or earnings she might have received in the meantime.

24. The present complainant is likewise entitled to reinstatement with payment of salary and allowances and benefits due under her contract less any indemnity or earnings she may have received or receive until either her appointment is terminated after completion of the reduction-in-force procedure or she is redeployed under that procedure.

25. In view, however, of the recent decimation of posts in the WHO the Tribunal offers the Organization the alternative option of paying the complainant damages equal to the amounts payable under 24 above — without actually reinstating her in a post commensurate with her grade and experience — and of carrying out the procedure under the same conditions.

26. The complainant is entitled to the payment of interest on the sums due at the rate of 8 per cent a year from the due dates and to an award of costs.

27. The Tribunal allows the applications to intervene, the applicants do have the same rights as the complainant, save as to costs, insofar as they are in the same position in law and in fact as she.

DECISION

1. The impugned decision is set aside.
2. The Organization shall either reinstate the complainant as set out in 24 or pay her damages as set out in 25.
3. It shall apply to her the reduction-in-force procedure.
4. It shall pay her interest at the rate of 8 per cent a year on the sums due.
5. It shall pay her 2,000 Swiss francs in costs.
6. All her other claims are dismissed.
7. The applications to intervene are allowed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

Wm Douglas

WILLIAM DOUGLAS

Mella Carroll

MELLA CARROLL

MARK FERNANDO

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-THIRD SESSION

***In re* Stoneburner** **Judgment 1630**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Rand Lawson Stoneburner against the World Health Organization (WHO) on 8 August 1996, the WHO's reply of 8 November, the complainant's rejoinder of 5 December 1996 and the Organization's surrejoinder of 11 March 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of the United States, joined the staff of the WHO in September 1991 under a fixed-term appointment for two years on a post - No. 1.3757 - for a medical officer under the Global Programme on AIDS (GPA) at grade P.5. In form 172 "Notification of decision on position request", which the chief of Budget signed on 19 March 1990, the Administration had described his post as "indefinite, subject to continued need and availability of funds". The Organization extended his appointment by two years in September 1993 and by four months in 1995, until 31 December of that year.

In a letter dated 27 September 1995, a senior officer of the Division of Personnel told him that the Organization had decided to terminate his appointment under Staff Rule 1040 - headed "Completion of temporary appointments" - at 31 December 1995, when his post was "scheduled for abolition" for want of funding. On 23 November 1995 he gave the headquarters Board of Appeal notice of his intent to appeal against termination.

By a letter of 19 March 1996 an Assistant Director-General told the chairman of the Staff Committee that the Director-General was willing to give former staff of the Programme leave to go directly to the Tribunal. On 28 May 1996 the complainant informed the headquarters Board that he was withdrawing his appeal.

B. The complainant submits that the decision to terminate his appointment was unlawful. He alleges breach of formal requirements about notice of termination in the WHO Manual and failure to carry out the "reduction-in-force procedure" required under Staff Rule 1050.2, which is about termination due to abolition of a post of indefinite duration.

He seeks the quashing of the notice of termination in the letter of 27 September 1995 and reinstatement as from 1 January 1996 with payment, plus interest, of all entitlements due from that date less any occupational earnings he may have had up to the actual date of reinstatement. He claims 4,000 Swiss francs in costs.

C. In its reply the WHO says that it treated him fairly and in full compliance with the rules. The Manual provision he relies on does not apply to his case. Nor was he entitled to a reduction-in-force procedure under Rule 1050.2 because the expiry of his appointment did not coincide with the abolition of a post of indefinite duration. In any event the Organization did its utmost to find other employment for him. If the Tribunal ruled in his favour, the application of the reduction-in-force procedure would be a more appropriate remedy than reinstatement.

D. In his rejoinder the complainant rebuts the Organization's pleas and enlarges on his own. He presses his claims.

E. In its surrejoinder the WHO maintains that it met the "essential" requirements of the material provisions in the Manual and that there was no call to apply the reduction-in-force procedure to the complainant's case.

CONSIDERATIONS

1. The complainant joined the Organization on 1 September 1991 as a medical officer on post No. 1.3757 at grade P.5 under the Global Programme on AIDS (GPA). The post had been established on 19 March 1990 as "indefinite, subject to continued need and availability of funds" according to form 172 ("Notification of decision on position request"). His appointment was for two years, the first year being probationary. His

appointment was extended to 31 August 1995 and finally to 31 December 1995. By a letter dated 27 September 1995 the chief of Contract Administration and Information, in the Division of Personnel, informed him that funding for his post would cease, and the post itself would be abolished, at 31 December 1995 and that his appointment would end at that date in accordance with Staff Rule 1040. That rule reads:

> "Temporary appointments, both fixed-term and short-term shall terminate automatically on the completion of the agreed period of service in the absence of any offer and acceptance of extension. However, a staff member serving under a fixed-term appointment of one year or more, whom it has been decided not to reappoint, shall be notified thereof not later than three months before the date of expiry of the contract ..."

On 23 November 1995 the complainant gave notice of appeal against the decision to terminate his appointment and by agreement between the parties the case has been submitted directly to the Tribunal.

2. The background to the dispute is that, after discussion with other international bodies that were to offer sponsorship, the Economic and Social Council of the United Nations adopted in July 1994 resolution 1994/24 approving the establishment of a joint and co-sponsored United Nations programme on HIV/AIDS (UNAIDS). In May 1995 the 48th World Health Assembly adopted a resolution of its own in which it endorsed the establishment of UNAIDS - "to which WHO will provide the administrative framework" - and asked the Director-General to "arrange for WHO to meet the administrative needs of the Programme once it is operational, in the light of the Organization's role as administering agency". The new Programme was to become "operational" by 1 January 1996.

3. By a memorandum of 6 March 1995 the Executive Director of the GPA informed all its staff at headquarters that it would cease to exist at 31 December 1995 and that the Division of Personnel would in due course be giving advice on each staff member's contractual position. He encouraged all the staff to apply for positions in UNAIDS and for suitable vacancies in the Organization. On 1 June 1995 the Director of the Division of Personnel forwarded to the Organization's senior officers a "List of GPA/WHO Professional staff available for reassignment" - there were 87 - together with a one-page curriculum vitae for each of them. On 20 June 1995 he forwarded to the Legal Counsel a "List of GPA/WHO General Service staff available for reassignment", of whom there were 35 and for each of whom he again appended a one-page curriculum vitae.

4. The closure of GPA led to the displacement of 242 staff, of whom 131 were at headquarters. To make matters worse, it came at a time when, as a result of acceptance of "zero growth" in the Organization's regular budget, 167 of its posts, some of which were vacant, had to be abolished anyway.

5. Notwithstanding the difficulties the Organization made efforts to reassign staff, to arrange for early retirement and mutually-agreed separation in suitable cases and to obtain employment elsewhere for the GPA staff. But it still had to carry out a "reduction-in-force" exercise for 27 staff who in its opinion held posts of indefinite duration or who had career service appointments. It granted all former GPA staff a terminal indemnity equivalent to at least three months' pay whether or not they were so entitled under the Staff Rules.

6. There are two grounds of complaint:

(a) breach of the provisions governing notice of termination of appointment; and

(b) breach of the procedural requirements applicable in the event of termination on account of abolition of post.

The Tribunal will take up (b) first.

The duration of the complainant's post

7. The fundamental issue in this case is whether the post which the complainant occupied was of indefinite duration, as he contends, or of limited duration, as the Organization maintains. The Tribunal has already had occasion to determine whether a post is of indefinite or limited duration: see, for example, Judgments 470 (*in re* Perrone), 515 (*in re* Vargas), 891 (*in re* Morris) and 974 (*in re* Birendar Singh). In considering that issue a distinction must be drawn between the duration of the post and the duration of the appointment of the incumbent. It is a distinction that the Tribunal drew in Judgment 974.

8. The WHO argues that the reasoning in those judgments has ceased to apply because Staff Rule 1050.6 was amended as from 1 January 1989 to lay down definitions of duration. It now reads:

> "Posts of indefinite duration comprise those that continue in existence unless and until an express decision is taken to abolish them. Posts of limited duration automatically lapse at the end of the period for which they were established unless an express decision is taken to continue them. The Director-

> General shall determine the categories of posts falling within each of the above two definitions."

9. Other material rules include Manual paragraph II.9.260, which came into force on 20 September 1989 and which reads:

> "Reduction-in-force provisions do not apply to posts of limited duration; incumbents of such posts are not affected by these provisions and cannot benefit from them. Posts of limited duration automatically lapse at the end of the period for which they were established unless an express decision is taken to continue them. This period is specified in the relevant authorized position lists or programme budget proposals and also in vacancy notices and post descriptions. Posts of limited duration include:
> 260.1 posts financed from non-regular budget funds located either at Headquarters or at a regional office;
> 260.2 inter-regional or inter-country project posts;
> 260.3 country project posts, irrespective of the source of funds;
> 260.4 posts financed from the regular budget that have been expressly established for a specific period."

10. The procedure for the establishment and abolition of posts is set out in Section III.3 of the Manual. That provision has undergone many amendments since 1985; thus until 1991 a request for the establishment of a post had to be addressed to the Director of Personnel, and over the years some departments have changed names: for example, the Office of Administrative Management and Evaluation has become the Office of Staff and Management Development. But the basic procedure remains the same. The version dated 15 April 1991 of Section III.3 provides in paragraph 40:

> "Requests for the establishment or abolition of posts are addressed to Chief Budget in the first instance for review and advice as to availability of funding. The requests are then sent to the Director of Personnel who makes a preliminary review and transmits the request to the Office of Administrative Management and Evaluation for review and analysis. Administrative Management and Evaluation, if this appears necessary, obtains the observations of appropriate units at headquarters. Budget is responsible for consolidating the comments into a proposal for presentation together with the request to the Director-General and for notifying those concerned of the Director-General's decision."

The request is to be entered in form 171 ("Authorized position request") and a description of the post to be attached on form 81 ("Post description"). Again according to Section III.3, the Budget unit reviews the request so as to determine:

> "90.1 the date from which the post could be covered;
> 90.2 the funding during the current financial period;
> 90.3 the effect on subsequent financial periods and on the budget;
> 90.4 any other implications resulting from the establishment of the post."

Lastly, the same section states in paragraph 130:

> "The Director-General takes a decision on the request and returns the documents to Budget. The decision and any significant comments or recommendations, including the effective date if the request is approved, are conveyed by Budget on form WHO 172, Notification of Decision on Position Request, to the originator of the request, with a copy to Personnel."

11. The Organization submits that the category in which the complainant's post fell is to be determined solely by reference to Rule 1050.6 (see 8 above) and to Manual paragraph II.9.260 (see 9 above). Though acknowledging that neither vacancy notice nor post description contained any statement about the duration of the post, it argues that "no Organizational 'state of mind' can be inferred from the absence of information on these forms". It concedes that form 172 may describe some posts as "indefinite, subject to continued need and availability of funds" and others as "time-limited posts for period of two years from date of recruitment, extension of post subject to continued need and availability of funds". But – it argues – that form is "not the fundamental document that establishes whether a staff member's post is of limited or indefinite duration". It points out that the form was last updated in 1986, i.e. before the amendment of Rule 1050.6 and Manual paragraph II.9.260, and was not issued in pursuance of those provisions and that, besides, Budget used the term "indefinite" solely for its own purposes.

12. In answer to a query from the Division of Personnel about form 172 the chief of Budget stated in a memorandum dated 21 September 1995 that his unit did not give the terms "limited" and "indefinite" the same meaning as did Staff Rule 1050 and Manual paragraphs II.9.255 to 260. He explained that when the form "gives the Programme Manager our indication that the post is being established" as "indefinite", the meaning the word bore was the following:

> "The funding attached to the post is not time-limited and emanates from an unspecified source with some continuity, such as the regular budget (irrespective of location) or the unspecified part of the funds for some of the major extrabudgetary-funded programmes like ... GPA and posts financed from the Special Account for Servicing Costs. ..."

13. The Organization cites Judgment 1526 (*in re* Baigrie) on a case in which the complainant had produced form 172 as evidence of the nature of her post. But the issues in that case were whether failure to inform an applicant for employment that a post was of limited duration constituted breach of good faith and whether the Organization had ignored the staff member's rightful expectation of extension. The interpretation to be put on Rule 1050.6 and Manual paragraph II.9.260 and the legal effect of form 172 were not at issue. So Judgment 1526 affords no guidance on the material issues in the present case.

14. The sending of form 172 is an integral part of the procedure prescribed in Section III.3 of the Manual for the establishment of a post in the Organization and what the form says affords evidence of the nature of the created post both for budgetary and for personnel purposes. In this case the form refers to the creation of an "indefinite" post. Moreover, the Tribunal does not construe the phrase "subject to continued need and availability of funds", which appear on the form, as a term of limitation. Where a post is "time-limited" the phrase is used to indicate the basis upon which action may be taken to extend the duration of a post; and where the post is "indefinite" it means that the post will continue until a decision is taken to abolish it either because there is no further need for it or because funds are no longer available.

15. In construing Rule 1050.6 and Manual paragraph II.9.260 the Tribunal will apply the principle that Judgment 470 declared under 3(d):

> "The relationship between Organization and staff is governed by the Staff Regulations, the Staff Rules and the Manual. The Regulations are supplemented by the Rules, which are elaborated on in the Manual. There is therefore a hierarchy under which the Rules may not derogate from the Regulations, nor the Manual from the Rules."

If a post established by the Organization does not fall within the definition of "limited duration" in Rule 1050.6, that is conclusive notwithstanding any provision of the Manual. Even a post initially established as "time-limited" for a period of two years from the date of recruitment will become a post of unlimited duration if, on the expiry of that period, it is extended without any limit of duration. The definitions in Rule 1050.6 are not in conflict but wholly consonant with the case law. In Judgment 515 the Tribunal declared:

> "A post is of limited duration if the instrument which creates it or controls its length prescribes for it a fixed period, whether long or short. If there is no

> such prescription, the post is of indefinite duration, whether it is expected to last a long or a short time. ..."

That ruling holds good. There is no conflict between 1050.6 and Manual paragraph II.9.260 because the latter requires that "This period [viz. the period for which the posts were established] is specified in the relevant authorized position lists or programme budget proposals and also in vacancy notices and post descriptions". The Manual paragraph does not create a new category of posts separate and distinct from those described in 1050.6. What it does is identify according to the source of funding posts that will qualify as ones of limited duration provided that they meet the requirements of the paragraph as to notification and the requirements of 1050.6 as to limit of duration.

16. Staff Rule 1050.2 reads:

> "When a post of indefinite duration - or any post held by a staff member with a career-service appointment - comes to an end, a reduction in force shall (if the post was filled) take place, in accordance with procedures established by the Director-General ..."

The complainant held a post of indefinite duration. On its abolition 1050.2 applied and the completion of the reduction-in-force procedure became a condition precedent to any decision to terminate his appointment, the object of the Rule being the retention of staff who, on the strength of past performance and seniority, deserve "priority for retention". As was held in Judgment 1045 (*in re* Mitastein), under 3, notice of termination will be invalid unless the requirements of 1050.2 have been observed. The complainant's plea succeeds.

The abolition of the complainant's post

17. The complainant further contends that, failing evidence of any decision taken by the WHO in accordance with Section III.3 of the Manual to abolish his post, the purported termination of his appointment would be devoid of any legal basis.

18. The Organization retorts in its surrejoinder:

> "No 'decision' was taken in accordance with the procedures described under Part III of the Manual when the complainant's post was abolished, since these procedures would have served no functional purpose. ... that decision had already been taken by the highest Organisational authority, the World Health Assembly."

19. The Tribunal observes that the Assembly's resolution on the establishment of UNAIDS makes no mention of the abolition of posts under the Organization's own GPA. That some decision was taken to abolish the GPA posts is clear; there are, after all, constant references to it in the letters and notices exhibited. Yet since employment in the Organization is governed by individual contracts of appointment to individual posts, a specific decision to abolish the post was necessary. On the Organization's own admission none was taken. The complainant's plea again succeeds.

20. Since the complainant succeeds on the grounds stated above it is not necessary to entertain his plea about breach of the provisions governing notice of termination.

Relief

21. By way of relief the complainant seeks (1) the setting aside of the notice of termination of his appointment; (2) reinstatement as from 1 January 1996 and payment of salary, allowances and all other benefits due under his previous conditions of employment, plus interest thereon at such rate as the Tribunal may set, subject to deduction of any termination indemnities and occupational earnings received by him between 1 January 1996 and the actual date of reinstatement. He cites Judgments 1045, 1371 (*in re* Ortiz) and 1374 (*in re* González and others) in support of his contention that in the absence of valid notice of termination a fixed-term contract is renewed by implication.

22. The WHO submits that, if the Tribunal allowed this and the similar complaints, any relief it granted should strike an appropriate balance between providing fair and reasonable compensation and recognition of the potentially heavy financial burden the Organization would have to bear if all the complainants were, say, reinstated. It points out that twenty-nine former staff of the GPA have filed similar internal appeals and that over two hundred such staff may apply to intervene in the complaints. It concludes that, if the complaint were upheld, the Tribunal should, instead of ordering reinstatement, have the Organization proceed directly to a reduction-in-force exercise. It cites Judgment 891 (*in re* Morris) in support of its view that that exercise may be carried out in the absence of reinstatement.

23. In the case that Judgment 891 ruled on the issue was whether the abolished post was of indefinite or limited duration. The Tribunal held that the post, having started as one of limited duration, had become an indefinite one on extension and that the complainant was therefore entitled to the

application of the reduction-in-force procedure. Though he had applied for reinstatement for the purpose of carrying out the procedure, the Tribunal held that that was not necessary: the Organization could go through the procedure without reinstating him. The issues of the invalidity of the notice of termination and the consequences thereof which were raised in Mitastein were not raised in Morris. In Mitastein the invalidity of the notice of termination meant that that complainant's contract was renewed by implication and she was entitled not only to the application of the reduction-in-force procedure but also to payment of the salary and allowances due under her contract less any indemnity or earnings she might have received in the meantime.

24. The present complainant is likewise entitled to reinstatement with payment of salary and allowances and benefits due under his contract less any indemnity or earnings he may have received or receive until either his appointment is terminated after completion of the reduction-in-force procedure or he is redeployed under that procedure.

25. In view, however, of the recent decimation of posts in the WHO the Tribunal offers the Organization the alternative option of paying the complainant damages equal to the amounts payable under 24 above - without actually reinstating him in a post commensurate with his grade and experience - and of carrying out the procedure under the same conditions.

26. The complainant is entitled to the payment of interest on the sums due at the rate of 8 per cent a year from the due dates and to an award of costs.

DECISION

1. The impugned decision is set aside.
2. The Organization shall either reinstate the complainant as set out in 24 or pay him damages as set out in 25.
3. It shall apply to him the reduction-in-force procedure.
4. It shall pay him interest at the rate of 8 per cent a year on the sums due.
5. It shall pay him 2,000 Swiss francs in costs.
6. All his other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

Wm Douglas

WILLIAM DOUGLAS

Mella Carroll

MELLA CARROLL

MARK FERNANDO

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-THIRD SESSION

***In re* Wabitsch** **Judgment 1631**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Kurt Rudolf Wabitsch against the World Health Organization (WHO) on 5 June 1996, the WHO's reply of 6 September, the complainant's rejoinder of 5 December 1996 and the Organization's surrejoinder of 11 March 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who is German, joined the staff of the WHO on 17 July 1988 under a two-year fixed-term appointment as a medical officer at grade P.5 under the Global Programme on AIDS (GPA). He had his appointment extended by two years in 1990, 1992 and 1994. After giving him notice of termination under Staff Rule 1050.1 with effect from 30 June 1995, the Administration extended his appointment first to 31 August 1995 and later to 31 December 1995. In form 172, "Notification of decision on position request", which the chief of Budget signed on 7 April 1987, the Administration had described post 1.3420 as "time-limited ... for a period of two years from date of recruitment, extension of post subject to continued need and availability of funds".

In a letter dated 26 September 1995 a senior officer of the Division of Personnel informed him that the Organization had decided to terminate his appointment under Staff Rule 1050.1 at 31 December 1995, when his post was "scheduled for abolition" for want of funding. On 22 November 1995 he gave the headquarters Board of Appeal notice of appeal against termination.

By a letter of 19 March 1996 an Assistant Director-General informed the chairman of the Staff Committee that the Director-General was willing to give former staff of the Programme leave to go directly to the Tribunal. On 28 May 1996 the complainant told the headquarters Board that he was withdrawing his appeal.

B. The complainant submits that the decision to terminate his appointment was unlawful. He alleges breach of formal requirements about notice of termination in the WHO Manual and failure to carry out the "reduction-in-force procedure" required under Staff Rule 1050.2, which is about termination due to abolition of a post of indefinite duration. Though his post was originally one of limited duration, the WHO extended it without setting a new date of expiry and that made it one of indefinite duration.

He seeks the quashing of the notice of termination in the letter of 26 September 1995 and reinstatement as from 1 January 1996 with payment, plus interest, of all entitlements due from that date less any occupational earning he may have had up to the actual date of reinstatement. He claims 4,000 Swiss francs in costs.

C. In its reply the WHO says that it treated him fairly and in full compliance with the rules. The Manual provision he relies on does not apply to his case. Nor was he entitled to a reduction-in-force procedure under Rule 1050.2: his post being one of limited, not indefinite, duration, the material rule is 1050.1. Even if his original post had been of indefinite duration, he could not rely on any acquired right to the conditions attached to a post of that nature. In any event the Organization did its utmost to find other employment for him. If the Tribunal ruled in his favour, the application of the reduction-in-force procedure would be a more appropriate remedy than reinstatement.

D. In his rejoinder the complainant rebuts the Organization's pleas and enlarges on his own. He restates his claims.

E. In its surrejoinder the WHO maintains that it met the "essential" requirements of the material provisions in the Manual and that there was no call to apply the reduction-in-force procedure to the complainant's case.

CONSIDERATIONS

1. The complainant joined the staff of the Organization on 17 July 1988. He was appointed to post No. 1.3420 as a medical officer (clinician) under the Global Programme on AIDS (GPA). The post had been established on 7 April 1987 under the then Special Programme on AIDS, which later became the GPA, as a "time-limited post for period of two years from date of recruitment, extension of post subject to continued need and availability of funds" according to form 172 ("Notification of decision on position request"). Initially appointed for a period of two years, the complainant's contract was extended by further two-year periods ending on 16 July 1996. By a memorandum dated 29 March 1995 the chief of Contract Administration and Information, in the Division of Personnel, told him that, failing reassignment, his appointment would end at 30 June 1995 in accordance with Staff Rule 1050.1. A further memorandum informed him that his contract would be extended to 31 August 1995 and, again failing reassignment, would end at that date. On 12 June 1995 he lodged an internal appeal. He got a further extension to 31 December 1995. By a letter dated 26 September 1995 the chief of Contract Administration and Information informed him that funding for his post would cease at 31 December 1995 and the post itself would be abolished, and that his appointment would terminate at that date under Staff Rule 1050.1. That rule reads:

> "The temporary appointment of a staff member engaged for a post of limited duration may be terminated prior to its expiration date if the post is abolished."

In a memorandum of 15 December 1995 to the chief of Contract Administration and Information the complainant referred to his earlier notice of appeal against the termination of appointment. By an agreement between the parties the case has been submitted directly to the Tribunal.

2. The background to the dispute is that, after discussion with other international bodies that were to offer sponsorship, the Economic and Social Council of the United Nations adopted in July 1994 resolution 1994/24 approving the establishment of a joint and co-sponsored United Nations programme on HIV/AIDS (UNAIDS). In May 1995 the 48th World Health Assembly adopted a resolution of its own in which it endorsed the establishment of UNAIDS — "to which WHO will provide the administrative framework" — and asked the Director-General to "arrange for WHO to meet the administrative needs of the Programme once it is

operational in the light of the Organization's role as administering agency". The new Programme was to become "operational" by 1 January 1996.

3. By a memorandum of 6 March 1995 the Executive Director of the GPA informed all its staff at headquarters that it would cease to exist at 31 December 1995 and that the Division of Personnel would in due course be giving advice on each staff member's contractual position. He encouraged all the staff to apply for positions in UNAIDS and for suitable vacancies in the Organization. On 1 June 1995 the Director of the Division of Personnel forwarded to the Organization's senior officers a "List of GPA/WHO Professional staff available for reassignment" — there were 87 — together with a one-page curriculum vitae for each of them. On 20 June 1995 he forwarded to the Legal Counsel a "List of GPA/WHO General Service staff available for reassignment", of whom there were 35 and for each of whom he again appended a one-page curriculum vitae.

4. The closure of GPA led to the displacement of 242 staff, of whom 131 were at headquarters. To make matters worse, it came at a time when, as a result of acceptance of "zero growth" in the Organization's regular budget, 167 of its posts, some of which were vacant, had to be abolished anyway.

5. Notwithstanding the difficulties the Organization made efforts to reassign staff, to arrange for early retirement and mutually-agreed separation in suitable cases and to obtain employment elsewhere for the GPA staff. But it still had to carry out a "reduction-in-force" exercise for 27 staff who in its opinion held posts of indefinite duration or who had career service appointments. It granted all former GPA staff a terminal indemnity equivalent to at least three months' pay whether or not they were so entitled under the Staff Rules.

6. There are two grounds of complaint:

(a) breach of the provisions governing notice of termination of appointment; and

(b) breach of the procedural requirements applicable in the event of termination on account of abolition of post.

The Tribunal will take up (b) first.

The duration of the complainant's post

7. The fundamental issue in this case is whether the post which the complainant occupied was of indefinite duration, as he contends, or of limited duration, as the Organization maintains. The Tribunal has already had occasion to determine whether a post is of indefinite or limited duration: see, for example, Judgments 470 (*in re* Perrone), 515 (*in re* Vargas), 891 (*in re* Morris) and 974 (*in re* Birendar Singh). In considering that issue a distinction must be drawn between the duration of the post and the duration of the appointment of the incumbent. It is a distinction that the Tribunal drew in Judgment 974.

8. The WHO argues that the reasoning in those judgments has ceased to apply because Staff Rule 1050.6 was amended as from 1 January 1989 to lay down definitions of duration. It now reads:

> "Posts of indefinite duration comprise those that continue in existence unless and until an express decision is taken to abolish them. Posts of limited duration automatically lapse at the end of the period for which they were established unless an express decision is taken to continue them. The Director-General shall determine the categories of posts falling within each of the above two definitions."

9. Other material rules include Manual paragraph II.9.260, which came into force on 20 September 1989 and which reads:

> "Reduction-in-force provisions do not apply to posts of limited duration; incumbents of such posts are not affected by these provisions and cannot benefit from them. Posts of limited duration automatically lapse at the end of the period for which they were established unless an express decision is taken to continue them. This period is specified in the relevant authorized position lists or programme budget proposals and also in vacancy notices and post descriptions. Posts of limited duration include:
> 260.1 posts financed from non-regular budget funds located either at Headquarters or at a regional office;
> 260.2 inter-regional or inter-country project posts;
> 260.3 country project posts, irrespective of the source of funds;
> 260.4 posts financed from the regular budget that have been expressly established for a specific period."

10. The procedure for the establishment and abolition of posts is set out in Section III.3 of the Manual. That provision has undergone many amendments since 1985; thus until 1991 a request for the establishment of a post had to be addressed to the Director of Personnel, and over the years some departments have changed names: for example, the Office of

Administrative Management and Evaluation has become the Office of Staff and Management Development. But the basic procedure remains the same. The version dated 15 April 1991 of Section III.3 provides in paragraph 40:

> "Requests for the establishment or abolition of posts are addressed to Chief Budget in the first instance for review and advice as to availability of funding. The requests are then sent to the Director of Personnel who makes a preliminary review and transmits the request to the Office of Administrative Management and Evaluation for review and analysis. Administrative Management and Evaluation, if this appears necessary, obtains the observations of appropriate units at headquarters. Budget is responsible for consolidating the comments into a proposal for presentation together with the request to the Director-General and for notifying those concerned of the Director-General's decision."

The request is to be entered in form 171 ("Authorized position request") and a description of the post to be attached on form 81 ("Post description"). Again according to Section III.3, the Budget unit reviews the request so as to determine:

> "90.1 the date from which the post could be covered;
> 90.2 the funding during the current financial period;
> 90.3 the effect on subsequent financial periods and on the budget;
> 90.4 any other implications resulting from the establishment of the post."

Lastly, the same section states in paragraph 130:

> "The Director-General takes a decision on the request and returns the documents to Budget. The decision and any significant comments or recommendations, including the effective date if the request is approved, are conveyed by Budget on form WHO 172, Notification of Decision on Position Request, to the originator of the request, with a copy to Personnel."

11. The Organization submits that the category in which the complainant's post fell is to be determined solely by reference to Rule 1050.6 (see 8 above) and to Manual paragraph II.9.260 (see 9 above). Though acknowledging that neither vacancy notice nor post description contained any statement about the duration of the post, it argues that "no Organizational 'state of mind' can be inferred from the absence of information on these forms". It concedes that form 172 may describe some posts as "indefinite, subject to continued need and availability of funds" and others as "time-limited posts for period of two years from date of recruitment, extension of post subject to continued need and availability of

funds". But — it argues — that form is "not the fundamental document that establishes whether a staff member's post is of limited or indefinite duration". It points out that the form was last updated in 1986, i.e. before the amendment of Rule 1050.6 and Manual paragraph II.9.260, and was not issued in pursuance of those provisions and that, besides, Budget used the term "indefinite" solely for its own purposes.

12. In answer to a query from the Division of Personnel about form 172 the chief of Budget stated in a memorandum dated 21 September 1995 that his unit did not give the terms "limited" and "indefinite" the same meaning as did Staff Rule 1050 and Manual paragraphs II.9.255 to 260. He explained that when the form "gives the Programme Manager our indication that the post is being established" as "indefinite", the meaning the word bore was the following:

> "The funding attached to the post is not time-limited and emanates from an unspecified source with some continuity, such as the regular budget (irrespective of location) or the unspecified part of the funds for some of the major extrabudgetary-funded programmes like ... GPA and posts financed from the Special Account for Servicing Costs ..."

13. The Organization cites Judgment 1526 (*in re* Baigrie) on a case in which the complainant had produced form 172 as evidence of the nature of her post. But the issues in that case were whether failure to inform an applicant for employment that a post was of limited duration constituted breach of good faith and whether the Organization had ignored the staff member's rightful expectation of extension. The interpretation to be put on Rule 1050.6 and Manual paragraph II.9.260 and the legal effect of form 172 were not at issue. So Judgment 1526 affords no guidance on the material issues in the present case.

14. The sending of form 172 is an integral part of the procedure prescribed in Section III.3 of the Manual for the establishment of a post in the Organization and what the form says affords evidence of the nature of the created post both for budgetary and for personnel purposes. In this case the form refers to the creation of a "time-limited post for two years from the date of recruitment". Moreover, the Tribunal does not construe the phrase "subject to continued need and availability of funds", which appear on the form, as a term of limitation. Where a post is "time-limited" the phrase is used to indicate the basis upon which action may be taken to extend the

duration of a post; and where the post is "indefinite" it means that the post will continue until a decision is taken to abolish it either because there is no further need for it or because funds are no longer available. To extend a "time-limited post by another limited period it is necessary to take another decision specifying such limitation. There is no evidence of any such decision in this case.

15. In construing Rule 1050.6 and Manual paragraph II.9.260 the Tribunal will apply the principle that Judgment 470 declared under 3(d):

> "The relationship between Organization and staff is governed by the Staff Regulations, the Staff Rules and the Manual. The Regulations are supplemented by the Rules, which are elaborated on in the Manual. There is therefore a hierarchy under which the Rules may not derogate from the Regulations, nor the Manual from the Rules."

If a post established by the Organization does not fall within the definition of "limited duration" in Rule 1050.6, that is conclusive notwithstanding any provision of the Manual. Even a post initially established as "time-limited" for a period of two years from the date of recruitment will become a post of unlimited duration if, on the expiry of that period, it is extended without any limit of duration. The definitions in Rule 1050.6 are not in conflict but wholly consonant with the case law. In Judgment 515 the Tribunal declared:

> "A post is of limited duration if the instrument which creates it or controls its length prescribes for it a fixed period, whether long or short. If there is no such prescription, the post is of indefinite duration, whether it is expected to last a long or a short time. ..."

That ruling holds good. There is no conflict between 1050.6 and Manual paragraph II.9.260 because the latter requires that "This period [viz. the period for which the posts were established] is specified in the relevant authorized position lists or programme budget proposals and also in vacancy notices and post descriptions". The Manual paragraph does not create a new category of posts separate and distinct from those described in 1050.6. What it does is identify according to the source of funding posts that will qualify as ones of limited duration provided that they meet the requirements of the paragraph as to notification and the requirements of 1050.6 as to limit of duration.

16. Staff Rule 1050.2 reads:

> "When a post of indefinite duration - or any post held by a staff member with a career-service appointment - comes to an end, a reduction in force shall (if

> the post was filled) take place, in accordance with procedures established by the Director-General ..."

The complainant held a time-limited post that became one of indefinite duration. On its abolition 1050.2 applied and the completion of the reduction-in-force procedure became a condition precedent to any decision to terminate his appointment, the object of the Rule being the retention of staff who, on the strength of past performance and seniority, deserve "priority for retention". As was held in Judgment 1045 (*in re* Mitastein), under 3, notice of termination will be invalid unless the requirements of 1050.2 have been observed. The complainant's plea succeeds.

The abolition of the complainant's post

17. The complainant further contends that, failing evidence of any decision taken by the WHO in accordance with Section III.3 of the Manual to abolish his post, the purported termination of his appointment would be devoid of any legal basis.

18. The Organization retorts in its surrejoinder:

> "No 'decision' was taken in accordance with the procedures described under Part III of the Manual when the complainant's post was abolished, since these procedures would have served no functional purpose. ... that decision had already been taken by the highest Organisational authority, the World Health Assembly."

19. The Tribunal observes that the Assembly's resolution on the establishment of UNAIDS makes no mention of the abolition of posts under the Organization's own GPA. That some decision was taken to abolish the GPA posts is clear; there are, after all, constant references to it in the letters and notices exhibited. Yet since employment in the Organization is governed by individual contracts of appointment to individual posts, a specific decision to abolish the post was necessary. On the Organization's own admission none was taken. The complainant's plea again succeeds.

20. Since the complainant succeeds on the grounds stated above it is not necessary to entertain his plea about breach of the provisions governing notice of termination.

Relief

21. By way of relief the complainant seeks (1) the setting aside of the notice of termination of his appointment; (2) reinstatement as from 1 January 1996 and payment of salary, allowances and all other benefits due under his previous conditions of employment, plus interest thereon at such rate as the Tribunal may set, subject to deduction of any termination indemnities and occupational earnings received by him between 1 January 1996 and the actual date of reinstatement. He cites Judgments 1045, 1371 (*in re* Ortiz) and 1374 (*in re* González and others) in support of his contention that in the absence of valid notice of termination a fixed-term contract is renewed by implication.

22. The WHO submits that, if the Tribunal allowed this and the similar complaints, any relief it granted should strike an appropriate balance between providing fair and reasonable compensation and recognition of the potentially heavy financial burden the Organization would have to bear if all the complainants were, say, reinstated. It points out that twenty-nine former staff of the GPA have filed similar internal appeals and that over two hundred such staff may apply to intervene in the complaints. It concludes that, if the complaint were upheld, the Tribunal should, instead of ordering reinstatement, have the Organization proceed directly to a reduction-in-force exercise. It cites Judgment 891 (*in re* Morris) in support of its view that that exercise may be carried out in the absence of reinstatement.

23. In the case that Judgment 891 ruled on the issue was whether the abolished post was of indefinite or limited duration. The Tribunal held that the post, having started as one of limited duration, had become an indefinite one on extension and that the complainant was therefore entitled to the application of the reduction-in-force procedure. Though he had applied for reinstatement for the purpose of carrying out the procedure, the Tribunal held that that was not necessary: the Organization could go through the procedure without reinstating him. The issues of the invalidity of the notice of termination and the consequences thereof which were raised in Mitastein were not raised in Morris. In Mitastein the invalidity of the notice of termination meant that that complainant's contract was renewed by implication and she was entitled not only to the application of the reduction-in-force procedure but also to payment of the salary and allowances due under her contract less any indemnity or earnings she might have received in the meantime.

24. The present complainant is likewise entitled to reinstatement with payment of salary and allowances and benefits due under his contract less any indemnity or earnings he may have received or receive until either his appointment is terminated after completion of the reduction-in-force procedure or he is redeployed under that procedure.

25. In view, however, of the recent decimation of posts in the WHO the Tribunal offers the Organization the alternative option of paying the complainant damages equal to the amounts payable under 24 above — without actually reinstating him in a post commensurate with his grade and experience — and of carrying out the procedure under the same conditions.

26. The complainant is entitled to the payment of interest on the sums due at the rate of 8 per cent a year from the due dates and to an award of costs.

DECISION

1. The impugned decision is set aside.
2. The Organization shall either reinstate the complainant as set out in 24 or pay him damages as set out in 25.
3. It shall apply to him the reduction-in-force procedure.
4. It shall pay him interest at the rate of 8 per cent a year on the sums due.
5. It shall pay him 2,000 Swiss francs in costs.
6. All his other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

Wm Douglas

WILLIAM DOUGLAS

Mella Carroll

MELLA CARROLL

MARK FERNANDO

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-THIRD SESSION

***In re* Weiss** **Judgment 1632**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Gian Mario Weiss against the World Health Organization (WHO) on 29 July 1996, the WHO's reply of 22 November 1996, the complainant's rejoinder of 7 February 1997 and the Organization's surrejoinder of 18 April 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Italian who was born in 1951, joined the staff of the WHO in 1981 under the first of several short-term appointments, the last of which expired in May 1983. In 1987 he got a two-year appointment as an associate professional officer on funding from the Government of Italy, and the WHO extended it in 1989 until 31 May 1990. In June 1990 he got the first in another string of short-term appointments. On 1 June 1991 he took up a two-year appointment as a technical officer in the Programme on Substance Abuse (PSA) at grade P.3 on post No. 1.3836. In form 172, "Notification of decision on position request", which the chief of Budget signed on 1 May 1991, the Administration described post 1.3836 as "time-limited" for a period of 24 months. In June 1993 the WHO extended that appointment by two years.

In a letter of 14 November 1994 the Director of the Programme told him that the Organization was not going to extend his appointment beyond the date of expiry, and in a letter of 27 February 1995 a senior officer of the

Division of Personnel confirmed that his appointment would end at 31 May 1995 under Staff Rule 1040.

On 28 April 1995 the complainant gave notice of appeal. In a report dated 13 March 1996 the headquarters Board of Appeal recommended rejecting his appeal, yet paying him the equivalent of three months' salary without allowances by way of compensation for delay in processing it. By a letter dated 3 May 1996, which he impugns, the Director-General endorsed the Board's recommendation.

B. The complainant submits that the decision he is impugning is unlawful. He has three pleas. The first is that there were no grounds for the non-renewal, which the WHO ascribed to "budgetary constraints". The second is that it failed to comply with the rules, particularly Staff Rule 1050.6 on the difference between posts of indefinite and limited duration and Rule 1050.2 about the "reduction-in-force" procedure. His final plea is that the Administration's "manoeuvres" caused undue delay in the internal appeal.

He seeks the quashing of the decision of 3 May 1996 and reinstatement as from 1 June 1995 with payment, plus interest, of all entitlements due from that date less any occupational earnings he may have had from then until actual reinstatement. He claims damages for the delay in the internal proceedings and 5,000 Swiss francs in costs.

C. In its reply the WHO contends that the challenged decision was a proper exercise of discretion warranted by a shortage of funds. His post having been of limited duration, the complainant was not entitled to a reduction-in-force procedure. The WHO observes that the 13,724 Swiss francs it has already granted him for delays in the internal proceedings was compensation enough under that head.

D. In his rejoinder the complainant refutes the Organization's reply, expands on his pleas and broadens his claims.

E. In its surrejoinder the WHO presses the objections it raises in the reply and maintains that it was under no obligation to extend his appointment. If his complaint succeeded, the reduction-in-force procedure would offer more appropriate relief than reinstatement.

CONSIDERATIONS

1. The WHO appointed the complainant as from 1 June 1991 to post No. 1.3836 at grade P.3. His appointment was with a programme for the prevention and control of alcohol and drug abuse, known as the Programme on Substance Abuse (PSA). It was for two years, the first to be probationary.

2. A form — No. 172 — headed "Notification of decision on position request" and dated 1 May 1991 had the following entry:

> "Establishment approved as follows:
> time-limited post for period 1.6.91-31.5.93 (24 months)
> extension of post subject to continued need and availability of funds."

Another form, headed "Approval of post description" and dated 14 May 1991, described the new post as "effective 1 June 1991 to 31 May 1993".

3. On a form headed "Extension/Termination of Contract" and dated 3 December 1992 the complainant's supervisor asked for the extension of his appointment by two years until 31 May 1995. On 19 January 1993 the Director of Personnel signed a "personnel action" form so extending his appointment, which was described as a "fixed-term" one. The Organization has produced no evidence of any decision to extend the post by another "time-limited" period.

4. By a letter dated 14 November 1994 the Director of the Programme informed the complainant that "the funding source which provided for your post for four years is no longer available" and that the post — No. 1.3836 — would cease to be funded at 31 May 1995. The Director said that since his contract ended at that date there was no way of extending it with the Programme. After correspondence the chief of Contract Administration and Information, in the Division of Personnel, informed him by a letter dated 27 February 1995 that his contract would not be renewed and that his appointment would therefore end at 31 May in accordance with Staff Rule 1040.

5. On 28 April 1995 the complainant gave notice of appeal to the headquarters Board of Appeal. Much delay was attributable to the Organization in processing his appeal, but the hearings ended on 14 February 1996 and the Board reported on 13 March 1996. It concluded that post 1.3836 was a headquarters one funded from extrabudgetary sources; that as such it was "time-limited" and not subject to the "reduction-

in-force" procedure provided for in Staff Rule 1050; and that the notice of non-renewal given to the complainant on 27 February 1995 had been "in accordance with the applicable Staff Rules and Regulations". It "found no evidence to support [his] allegation of incomplete consideration of the facts", which afforded grounds for appeal under Rule 1230.1.2. It recommended rejecting his appeal but paying him the equivalent of three months' salary in compensation for the delay, which it said had "caused hardship". By a letter dated 3 May 1996 the Director-General informed the complainant that he was accepting the Board's recommendations. The Organization accordingly paid him three months' salary in compensation for the delay.

6. The complainant is impugning that decision on two grounds: absence of factual justification for it, and failure by the Organization to observe the provisions of the Staff Rules and Regulations. He claims further compensation for inordinate delay.

The observance of the material rules

7. The provision under which the Organization gave the complainant notice of termination, Rule 1040, reads as follows:

> "Temporary appointments, both fixed-term and short-term, shall terminate automatically on the completion of the agree period of service in the absence of any offer and acceptance of extension. However, a staff member serving under a fixed-term appointment of one year or more, whom it has been decided not to reappoint, shall be notified thereof not later than three months before the date of expiry of the contract. Such a staff member who does not wish to be considered for re-appointment shall also give that period of notice of his intention."

The complainant contends that he should have been given notice under Rule 1050.

8. Rule 1050.2 used to provide:

> "When a post of indefinite duration, which is filled, is abolished, a reduction in force shall take place, in accordance with procedures established by the Director-General, based on the following principles ..."

The "principles" then appear in clauses numbered 1 to 5. In several judgments since 1982, however, the Tribunal has ruled on cases in which a post of indefinite duration that was abolished had been held by a WHO staff member with a fixed-term appointment which expired at the same time. The issue was whether the applicable Rule was 1040 or 1050. The Tribunal held that in the absence of a specific provision in the Rules the right to the application of the reduction-in-force procedure arose on the abolition of a post of indefinite duration even though the staff member might have only a fixed-term appointment: see Judgments 470 (*in re* Perrone), 515 (*in re* Vargas), 891 (*in re* Morris) and 974 (*in re* Birendar Singh). In response to those judgments the Organization amended the material provisions of its Staff Rules and Manual. The Rules now read:

> "1050.2 When a post of indefinite duration - or any post held by a staff member with a career-service appointment - comes to an end, a reduction in force shall (if the post was filled) take place, in accordance with procedures established by the Director-General, based upon the following principles: ...
>
> 1050.3 Termination under this Rule shall require the giving of at least three months' notice to a staff member holding a career-service appointment or a confirmed fixed-term appointment of one year or more and at least one month's notice to any other staff member.
>
> 1050.4 A staff member whose appointment is terminated under this Rule shall be paid an indemnity in accordance with the following schedule and with due regard to Rule 380.2.
>
> ...
>
> 1050.5 The appointment of a staff member who has satisfactorily served the Organization for five years or more shall be considered as having been terminated under this Rule if the appointment was not renewed because of the abolition or intended abolition of a post.
>
> 1050.6 Posts of indefinite duration comprise those that continue in existence unless and until an express decision is taken to abolish them. Posts of limited duration automatically lapse at the end of the period for which they were established unless an express decision is taken to continue them. The Director-General shall determine the categories of posts falling within each of the above two definitions."

9. It is not in dispute that the complainant's post, No. 1.3836, was created for a definite period of two years and was therefore one of limited duration. In accordance with the rules it would have automatically lapsed at the end of the two years unless an express decision were taken to extend it. Although the Organization did take a decision to continue the post, there is, as was said in 3 above, no evidence that the decision was to continue it for any further specific period. The only inference to be drawn from the evidence that is before the Tribunal is that after expiry of the period of two years for which it was created the post was extended indefinitely, "subject to continued need and availability of funds". The form headed "Notification

of decision on position request" — referred to in 2 above — offers, after the words "Establishment approved as follows", the following options:

> "time-limited post for period [dates to be entered], extension of post subject to continued need and availability of funds";
>
> "indefinite, subject to continued need and availability of funds."

So there is nothing inconsistent in having a "time-limited post" and an "indefinite" post subject to the same contingencies.

10. The rules on the categories of post falling within the two definitions and determined by the Director-General are set out at Manual paragraph II.9.260, which provides:

> "Reduction-in-force provisions do not apply to posts of limited duration; incumbents of such posts are not affected by these provisions and cannot benefit from them. Posts of limited duration automatically lapse at the end of the period for which they were established unless an express decision is taken to continue them. This period is specified in the relevant authorized position lists or programme budget proposals and also in vacancy notices and post descriptions. Posts of limited duration include:
>
> 260.1 posts financed from non-regular budget funds located either at Headquarters or at a regional office; ..."

11. The headquarters Board of Appeal concluded that post 1.3836 was "a Headquarters post funded from extra-budgetary sources, and that as such it was of a time-limited duration and not subject to a Reduction-in-Force procedure". But what the Board should have done was look at the definitions in the Staff Rules and decide which of them applied to the complainant's post. Only if the definition of a post of limited duration applied were the categories of post determined by the Director-General relevant.

12. The Organization argues that it had no obligation to explain in extending the contract that the post was one of limited duration. But that is not the point. The Organization has produced no document at all about the decision to continue post 1.3836 and in the absence of a decision to establish it for another definite period its continuance must have been indefinite.

13. The conclusion is that a post that was originally of limited duration became one of indefinite duration and the complainant was therefore entitled to the application of the reduction-in-force procedure provided for in Rule 1050.2. Rule 1050.2.5 provides:

> "a staff member's appointment shall not be terminated before he has been made a reasonable offer of reassignment if such offer is immediately possible."

The termination of the complainant's appointment under Rule 1040 was therefore invalid.

The justification for termination

14. His other plea is that his post was not linked to any specific funding and that the Programme on Substance Abuse had enough funds at its disposal anyway to continue financing it. The Organization answers that senior managers have the right to determine the priorities of programmes and to decide accordingly whether or not to extend a particular appointment.

15. The Tribunal accepts that it was on his own assessment of what was in the best interests of the Programme and the Organization that the Director of the Programme had to decide what use to make of the extrabudgetary funds allocated or pledged to it. His decision against extending the complainant's appointment was not a misuse of his discretion.

The delay in the internal appeal proceedings

16. Lastly, the complainant objects to the amount he was granted for the delay in dealing with his internal appeal. The amount that the headquarters Board of Appeal recommended and that the Director-General granted him was the equivalent of three months' salary without any allowances: it came to 13,724 Swiss francs.

17. Under Staff Rule 1230 a Board of Appeal should report its findings within ninety days of receipt of the full statement of appeal and the Director-General should inform an appellant of his decision within sixty days of the receipt of the Board's report. So some five months are allowed in all. In this case the complainant filed his statement of appeal on 26 May 1995 and he got the final decision on 3 May 1996, i.e. over six months beyond the allowable maximum.

18. The complainant considers the sum of 13,724 Swiss francs inadequate particularly as he "maintained his home in Geneva" in the expectation that the appeal would be disposed of within the five months. He says he suffered loss in excess of the sum awarded, though he puts no figure on it.

19. The Organization says that the sum that the complainant's representative claimed was 10,000 United States dollars, which was less

than the equivalent of the three months' salary he actually got. The complainant retorts that the figure of $10,000 was only an example of an award that the Tribunal had made for undue delay in Judgment 1319 (*in re* Moscoso).

20. Since by virtue of the present judgment the complainant is, as is explained below, to be granted arrears of pay from 1 June 1995, no further award need be made by way of compensation for the delay in dealing with his internal appeal.

Relief

21. The WHO contends that, if the complaint were upheld, the Tribunal should, instead of ordering reinstatement, have the Organization proceed directly to a reduction-in-force exercise. It cites Judgment 891 (*in re* Morris) in support of its view that that exercise may be carried out in the absence of reinstatement.

22. In the case that Judgment 891 ruled on the issue was whether the abolished post was of indefinite or limited duration. The Tribunal held that the post, having started as one of limited duration, had become an indefinite one on extension and that the complainant was therefore entitled to the application of the reduction-in-force procedure. Though he had applied for reinstatement for the purpose of carrying out the procedure, the Tribunal held that that was not necessary: the Organization could go through the procedure without reinstating him. The issues of the invalidity of the notice of termination and the consequences thereof, which were raised in Judgment 1045 (*in re* Mitastein), were not raised in Morris. In Mitastein the invalidity of the notice of termination meant that that complainant's contract was renewed by implication and she was entitled not only to the application of the reduction-in-force procedure but also to payment of the salary and allowances due under her contract less any indemnity or earnings she might have received in the meantime.

23. The present complainant is likewise entitled to reinstatement with payment of the salary, allowances and benefits due under his contract less any indemnity or earnings he may have received or receive until either his appointment is terminated after completion of the reduction-in-force procedure or he is redeployed under that procedure.

24. In view, however, of the recent decimation of posts in the WHO the Tribunal offers the Organization the alternative option of paying the complainant damages equal to the amounts payable under 23 — without

actually reinstating him in a post commensurate with his grade and experience — and of carrying out the procedure under the same conditions.

25. The complainant is entitled to payment of interest on the sums due at the rate of 8 per cent a year from the due dates and to an award of costs.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The Organization shall either reinstate the complainant as set out in 23 or pay him damages as set out in 24.
3. It shall apply to him the reduction-in-force procedure.
4. It shall pay him interest at the rate of 8 per cent a year on the sums due.
5. It shall pay him 2,000 Swiss francs in costs.
6. His other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

Wm Douglas

WILLIAM DOUGLAS

Mella Carroll

MELLA CARROLL

MARK FERNANDO

A B Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-THIRD SESSION

***In re* Carballo** **Judgment 1633**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Manuel Carballo against the World Health Organization (WHO) on 26 February 1996, the WHO's reply of 30 September 1996, the complainant's rejoinder of 3 January 1997 and the Organization's surrejoinder of 26 March 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who was born in 1941 and is British, joined the staff of the WHO in 1973 as a consultant. The Organization granted him fixed-term appointments from 1978 until 1993, the last two being each for five years. At the material time he held a grade P.6 post in the Division for the Mobilization of Resources.

By a letter of 25 October 1993 the Director of the Division of Personnel told him that if the Organization failed in its efforts to find funds for a suitable post for him it would not renew his contract; in the meantime, to comply with the requirement of three months' notice it was extending his contract to 31 January 1994.

By a letter of 31 January 1994 the Director proposed putting him on unpaid leave for three months pending further efforts by the Organization to find him a post. The Director said that if by the end of that period no post had been found his contract would end. As things turned out, however, he had his unpaid leave extended until 31 October 1994. At that date the WHO did not tell him of the outcome of its search for a post or that it was ending his appointment.

Since 1 February 1994 the complainant has held short-term appointments, some of them half-time. By letters of 8 November, of 12, 17 and 20 December 1994 and of 28 January 1995, the complainant or, while he was in Sarajevo, his wife asked about his status and about what the Organization would be deciding on his case. By a letter of 15 February 1995 his wife asked the Director-General to take "corrective action".

On 21 April 1995 he filed an internal appeal against the implied decision to reject his claim of 15 February. In its report of 6 November 1995 the Board of Appeal recommended granting him a contract for at least two years as from 1 November 1994; reassigning him to a post commensurate with his qualifications, experience and grade; paying him salary, allowances and other entitlements from 1 November 1994; and paying him 15,000 Swiss francs in damages and 2,000 francs in costs. The Director-General did not tell the complainant of his decision and did not forward to him a copy of the report within the time limit of sixty days set in Staff Rule 1230.3.1. The complainant is therefore challenging the implied decision to reject his appeal.

By a letter of 14 March 1996 the Director-General forwarded the Board's report to the complainant. He agreed to give him a two-year appointment, to pay him his salary, allowances and other entitlements, and to pay him the full amount in damages and 500 francs in costs.

Since 1 July 1995 the complainant has been employed under short-term contracts, half-time for the WHO's Division of Family Health and half-time for the International Organization for Migration (IOM).

B. The complainant contends that his appointment was never terminated. He was on unpaid leave, and therefore still a member of the staff, and he never got the required notice of three months. He submits that the post he held was one of "indefinite duration" as defined in the case law and that the WHO ought therefore to have carried out the prescribed "reduction-in-force" procedure before putting an end to his appointment. His conclusion is that his contract was tacitly renewed and that the Organization failed in its duty to pay him salary, allowances and other entitlements.

He accuses the WHO of dilatory tactics which aggravated the injury he sustained. It failed to discharge its obligation to reply within a reasonable time to his internal appeal. Its handling of his case was seriously harmful to his professional reputation and career. It has had many opportunities in the last three years of assigning him to a post he was fully qualified for, but the Director-General has consistently refused.

He seeks the renewal of his fixed-term appointment for five years from 1 November 1994; his reassignment to a post commensurate with his qualifications, experience and grade; the payment of his salary, allowances and other entitlements from 1 November 1994; and awards of damages for the injury to his professional reputation and career and for the Organization's failure to take a decision on his internal appeal within a reasonable time, and of 6,000 Swiss francs in costs.

C. In its reply the WHO submits that the only matters still at issue are the duration of the complainant's new appointment, his reassignment to a particular post and the amounts of damages and costs.

As to the renewal of his appointment, it points out that in a letter dated 4 March 1995 he asked for not less than two years. So he was willing to accept such a period. The WHO explains that in any event it did not have the funds to finance a longer contract. The Staff Regulations and Staff Rules and the terms of the complainant's appointment make it plain that the renewal of a fixed-term appointment is subject to the availability of funds. According to the case law a decision to renew a contract, and the duration of such contract, are at the Director-General's discretion.

As to his claim to reassignment to a particular post the WHO was unable to act on the Board's recommendation since there was no such post and it had no funds to create one.

Lastly, as to the sums he claims, it says that it acted in good faith and was not at fault. Though it ought to have told him about his status before his unpaid leave ran out, the sum of 15,000 Swiss francs it has already paid him affords him fair redress for the injury.

D. In his rejoinder the complainant submits that for want of any decision by the Organization his contract was, in keeping with precedent, tacitly renewed for five years. His letter of 4 March 1995 drew no answer and therefore cannot afford grounds for the decision to renew his contract for two years. With the funds at its disposal the Organization had many opportunities of finding him a suitable post.

He alters his claims. Since his claim to payment of salary from 1 November 1994 has been met since the filing of his complaint, he seeks the payment of interest on the sums made over to him with unaccountable delay. Since the defendant has paid him 15,000 Swiss francs, he waives his claims to damages. He presses his other claims.

E. In its surrejoinder the Organization observes that the renewal of an appointment is not a right but at the Director-General's discretion. So is the duration of it a matter that depends, not on that of any previous appointment, but on the Organization's needs and the money at its disposal. It was unable to reassign the complainant to a suitable post. It objects to his claim to the payment of interest since, although it regrets the delay in some payments, it never showed him malice and has already paid him 15,000 Swiss francs in damages.

CONSIDERATIONS

1. The complainant joined the WHO in 1973 and was employed under a series of fixed-term appointments from 1978. In the period from 1 January 1984 to 31 December 1993 he held two consecutive five-year appointments.

2. By a letter of 25 October 1993 the Director of the Division of Personnel told him that there were no funds to finance the extension of his contract beyond 31 December 1993, the date scheduled for the abolition of his post. The Organization granted him, however, an extension to 31 January 1994 in order to comply with the requirement of three months' notice of non-renewal.

3. After discussion the Organization offered instead, in a letter of 31 January 1994, to put him on leave without pay for three months, from 1 February to 30 April 1994, and to pay his and its own pension and health insurance contributions for that period. He accepted its offer.

4. By a memorandum dated 5 April 1994 the Director of Personnel informed him of the extension of his unpaid leave by six months to 31 October 1994. He — or his wife on his behalf — wrote the WHO letters on 8 November and on 12, 17 and 20 December 1994 about his employment status. There was no reply. He wrote again on 28 January 1995 asking the Organization to let him know at once what action it intended to take to fulfil its obligations. In a letter of 15 February 1995 his wife asked the Director-General in accordance with Staff Rule 1230.8.1 to take "corrective action". The Director-General failed to answer within the time limit of sixty days in Rule 1230.8.3. On 4 March the complainant wrote a letter from Sarajevo to

the Director of Personnel saying that he "would expect an extension of not less than two years as from 1 November 1994" at the same grade and with the "appropriate step increases". In that letter the complainant was commenting on a draft agreement between the WHO and the International Organization for Migration (IOM) about the sharing of his employment. Such sharing did come about and began on 1 July 1995. In his letter the complainant said that several important issues needed to be clarified and settled such as the use of half of his time by the WHO, the "honouring, in full", of the obligations of the Organization since 1 November 1994 and his contractual status. He made a related point about post descriptions in the WHO requiring medical or public-health training.

5. The letter of 4 March not having been answered, his wife, who was in Geneva, wrote on 18 March 1995 expressing his "grave concern" and asking for a precise and prompt reply to all the points in his letter of the 4th. Having still received no reply, he gave notice on 21 April of appeal to the headquarters Board of Appeal. His claims in his brief dated 24 April included renewal of his fixed-term appointment for five years as from 1 November 1994. The Board's report to the Director-General, dated 6 November, was submitted on 9 November 1995. The Director-General having failed to inform the complainant of his decision within sixty calendar days thereafter, i.e. by 8 January 1996, as Rule 1230.3.1 required, the complainant lodged this complaint on 26 February 1996 against the implied rejection of his appeal.

6. The Director-General took a decision dated 14 March 1996 on the Board's recommendations. He accepted the recommendation it had made for extending the complainant's fixed-term contract by two years from 1 November 1994 "in line with the proposal made by the Administration and with the statement made by the Appellant in March 1995". He also accepted its recommendation for the payment of 15,000 Swiss francs to the complainant in damages for the injury to his professional standing and career. The Director-General did not, however, accept its recommendation that the complainant be reassigned to a post commensurate with his qualifications, experience and grade.

7. The Organization says that the central question is whether the complainant is entitled to have his appointment extended by five years rather than the two. It seeks to justify the two by citing the letter the complainant wrote to it on 4 March 1995.

8. The Organization may not rely on the complainant's apparent willingness in March 1995 to accept a two-year extension of his contract: since it did not reply to his letter of 4 March it did not accept his offer. In April 1995 he sought an extension by five years, thereby withdrawing any offer to settle for two.

9. When his unpaid leave expired at 31 October 1994, the Organization took no decision for sixteen months as to whether or not to extend his appointment, which was therefore automatically extended. The question is not whether the Organization might have taken a decision before the expiry of his contract at the end of October 1994 to extend it by only two years, but what the consequence is of its failure to take a decision at the time. The answer to that question is that the automatic extension of his contract from 1 November 1994 was by whatever period would have been normal. As the Director of Personnel told him, the normal practice would have been to offer him another five years if funding was assured. It was up to the Organization to consider before the expiry of his contract whether the funding was. Since it failed to do so at the time, he must be granted an extension by the period normal for his case, i.e. five years. It follows that the Director-General's decision of 14 March 1996 — after the filing of this complaint — to extend his contract by two years cannot stand. The complainant's rights flow from the failure to take a decision before 31 October 1994.

10. As was said in 4 above, the complainant has been with the IOM since 1 July 1995 under the agreement for the sharing of his services with the WHO. By a letter of 1 July 1996 that Organization asked the WHO to extend the agreement by twelve months from 1 April 1996, i.e. to 31 March 1997. It got no written reply. What did happen was that the Director of Personnel wrote the complainant a letter on 26 July 1996 giving him notice that his appointment with the WHO would expire at 31 October 1996. In a letter of that very date the IOM asked the WHO to extend the loan of his services by not less than six months starting on 1 November 1996 and offered to refund the costs in full to the WHO.

11. The complainant says in his rejoinder that to date he has not learnt of any reply from the WHO to the IOM's offer and that he has been paid no salary since 31 October 1996, although he is actually working for the IOM.

12. He has made claims for relief under different heads. He has withdrawn his claim to damages for injury to his professional standing and career and for the failure to take a decision within a reasonable time. What

are left are his claims to assignment to a post commensurate with his qualifications, experience and grade, to interest on late payment of his salary, allowances and other entitlements, and to costs.

13. Since the IOM want to keep him on, the question of his entitlement to a suitable post at the WHO would arise only if the agreement with the IOM came to an end before the expiry of his five-year contract.

14. He is entitled to the payment of interest on arrears under the principle of equal treatment so as to keep parity between staff members who receive payment at the due dates and those who get it late: see Judgment 1403 (*in re* Tejera Hernandez).

15. He seeks costs and the Tribunal awards him 5,000 Swiss francs under that head.

DECISION

For the above reasons,

1. The Director-General's implied decision to reject the complainant's claims is set aside.
2. The Organization shall grant him a fixed-term appointment for five years as from 1 November 1994.
3. If the agreement between the WHO and the International Organization for Migration on the sharing of the complainant's employment ends before 31 October 1999 the Organization shall reinstate him for the remainder of the period of five years in a post suited to his qualifications, experience and grade.
4. It shall pay him as from 1 November 1996 the salary, allowances and other entitlements due, including contributions to the United Nations Joint Staff Pension Fund and to the Staff Health Insurance Plan.
5. It shall pay him interest at the rate of 8 per cent a year on the sums due by way of salary, allowances and other entitlements since 1 November 1996 as from the due dates.
6. It shall pay him 5,000 Swiss francs in costs.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

Wm Douglas

WILLIAM DOUGLAS

Mella Carroll

MELLA CARROLL

MARK FERNANDO

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-THIRD SESSION

***In re* Gawlitta** **Judgment 1634**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Martin Gawlitta against the European Molecular Biology Laboratory (EMBL) on 2 September 1996, EMBL's reply of 27 November 1996, the complainant's rejoinder of 7 February 1997 and the Laboratory's surrejoinder of 20 March 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a German who was born in 1957, joined the staff of the Laboratory on 1 January 1991 under a so-called "supernumerary" appointment in category S.1 as an assistant in the Department of Finance and Accounts. His contract provided for either party to give notice of termination "without giving reasons".

According to Internal Policy No. 35, which the Administration issued in November 1987, only under "very special circumstances" may the duration of a supernumerary appointment in category S.1 exceed 12 months.

By a memorandum dated 8 December 1995 the head of Personnel told the complainant that EMBL would be terminating his appointment on 19 January 1996, but he gave no reasons. On 27 December 1995 the complainant appealed to the Director-General. In its report of 20 May 1995 the Joint Advisory Appeals Board concluded that the Laboratory had complied with the terms of his contract. In a letter dated 4 June 1996, which he is impugning, the Director-General rejected the appeal.

B. The complainant submits that the termination of his appointment was unlawful. The decision was taken *ultra vires*, failed to state any reasons and did not give him enough notice. In any event there were no grounds for termination and the Laboratory was in breach of good faith.

He seeks the quashing of the impugned decision and reinstatement under a fixed-term appointment. He also claims at least 10,000 German marks in costs.

C. In its reply EMBL says it acted in strict compliance with the terms of his appointment and the material rules. General principles of the law of the international civil service do not prevail over the specific terms of a contract. Though EMBL was not bound to give him reasons for its decision he knew full well that it was due to "dissatisfaction" with his performance and conduct.

D. In his rejoinder the complainant seeks to rebut the Laboratory's pleas in the reply. He contends that EMBL had a duty to substantiate such a decision.

E. In its surrejoinder the Laboratory submits that the mere continuance for almost five years of the complainant's supernumerary appointment could not afford him rights he never had under that contract.

CONSIDERATIONS

1. The EMBL employed the complainant from 1 January 1991 under a contract dated 5 December 1990. That contract described his "Category of Personnel" as "Supernumerary Employee (A) - S1" and his function as that of a "Bookkeeping Assistant" at grade 2-0; it set a probationary period of six months; and it provided for termination after that period without any statement of reasons by the giving of six weeks' notice. It did not state the duration of the contract. It said that the contract was subject to the Staff Rules and Regulations as well as to the internal guidelines and rules issued by the Director-General.

2. The complainant received regular advancements in step on the completion of probation and on every anniversary of his appointment up to 1 January 1994. By a memorandum of 3 January 1995 the head of Personnel informed him that for the reasons stated in his own memorandum of 18 October 1994 and the Administrative Director's of 27 October he was not being granted an annual step increase but:

> "Should your work performance have improved by the end of April 1995 to an extent that justifies the removal of [those two] letters from your personal file you will then receive a step increase."

The head of Personnel told him by a memorandum of 18 April 1995 that he had fulfilled those requirements and by another of 10 May 1995 that he was granted as from 1 May the promotion to "4-04" which had until then been withheld.

3. In another memorandum of 18 April 1995 the head of Personnel informed him of his transfer from the Finance Department to Personnel. In that memorandum the "Category of Personnel" was described as "Administrative Officer of Paying Office" and not as "Supernumerary". The EMBL did not, however, carry out that transfer but decided instead to keep him in Finance, "where he could draw on his experience of the work and consolidate on a recent performance that had been considered satisfactory enough to grant him a step increase to 4-04".

4. By a memorandum dated 8 December 1995 the head of Personnel gave him six weeks' notice of termination without any statement of reasons.

5. On 27 December he filed an internal appeal challenging the validity of that notice on the grounds that the memorandum had been signed by the head of Personnel and not, as Staff Rule 2.1.02 required, by the Director-General; that it did not, as Staff Regulation R 2.6.06 required, state the reasons for termination; and that the termination, for which there was in fact no cause, was in breach of good faith.

6. In its report of 20 May 1995 to the Director-General the Joint Advisory Appeals Board concluded that, though the accuracy and quality of the complainant's work were undisputed, relations between him and his first-level supervisor had irretrievably broken down, partly because he "could be seen to be overqualified for his post". The Board observed that contracts for supernumeraries were beginning to be widely used to relieve difficulties caused by limits imposed on the EMBL in the recruitment of staff; that, while they "were originally intended to apply to short term positions", they were more and more being applied to "long term employment ... in administrative, secretarial and other posts"; and that they were "inappropriate for long term employment" by the EMBL and "should be eliminated as quickly as possible". The Board considered the contract between the complainant and the EMBL to be "inappropriate for the period of his employment", and that its termination conditions were suitable only

for a contract not exceeding one year, and expressed dismay "that a person could be employed for 5 years on a contract with such poor personal protection". It concluded, however, that the parties were bound by the contract which they had signed and that the EMBL had acted strictly in accordance with its terms.

7. The complainant asks the Tribunal to declare that the termination was invalid and that he is entitled to further employment by the EMBL under a fixed-term contract.

8. The EMBL pleads that under Staff Rule 1.1.01 its legal relationship with each employee is governed by the Staff Rules, the Staff Regulations and the contract. The contract concluded with the complainant provided for termination with due notice, but without any statement of reasons, and declared him to be a supernumerary employee. Not only did he accept those terms at the time but he did not challenge them even later by internal appeal. Nor can he have assumed that his contractual relationship with the Laboratory underwent any fundamental legal change by the passage of time.

9. In Judgment 701 (*in re* Bustos) the Tribunal held:

> "The function of a court of law is to interpret and apply a contract in accordance with the intention of the parties. When a contract is expressed in writing, the intention is normally to be ascertained from the documents produced. In some cases, however, the parties — or at any rate the party which is in a position to formulate the document — do not desire that the true relationship should be revealed. The reason for this is that, if the true relationship was made manifest, the law would impose consequences which the parties — or at any rate the stronger of them — do not wish to face."

And in Judgment 1385 (*in re* Burt) the Tribunal looked behind the wording of a written contract on the grounds that it was merely a device to deny the employee the protection of the rules; it gave effect to the real intention of the parties.

10. Applying those principles, the Tribunal will determine from the terms of the complainant's contract and in the light of the applicable Staff Rules and Regulations whether he was indeed a supernumerary employee at the time of termination.

11. Staff Rule 1.2.01 distinguishes two categories of personnel: "established" or "staff members", and "non-established" personnel, consisting of supernumeraries, fellows, visitors and trainees.

12. Under Staff Rule 2.1.05 staff members are to be granted either a fixed-term contract of not more than five years' initial duration, an open-ended contract or an indefinite contract with no date of expiry save the normal age of retirement.

13. According to Regulation R D.1, supernumeraries are "casual workers employed outside the scope of the Staff Complement to carry out a certain task for a limited period of time" and, according to Regulation R 2.1.06, are employed "part-time or for work of specified duration normally up to 6 months".

14. Internal Policy No. 35, approved by the Administration and the Staff Association in 1987, set out guidelines for the employment of supernumeraries. There were three categories of position they might hold, and the first consisted of:

> "Positions in which a staff member could be employed; but due to short-time requirements or specific talents staff membership is not primarily considered."

The statement added that the duration of the contract of a supernumerary "must be shown in the contract" and not be more than twelve months, though an exception was allowable in special circumstances.

15. The Staff Regulations prescribe for each type of contract periods of notice applicable to resignation, termination and dismissal, but with the proviso that they may be reduced by mutual agreement. Under Regulation R 2 6.06 every "member of the personnel" is entitled to be "notified of his dismissal in a letter indicating the reason or reasons, the date of termination of his contract and the date of the last day to be worked". There is no provision for any exclusion or exception.

16. It is the Director-General's duty under Regulation R 2 1.11 to ensure that every supernumerary receives a written contract which specifies, among other matters, the category of personnel to which he belongs, the classification of his work or the function to be performed, and a period of probation not to exceed three months.

17. The basic terms and conditions of the complainant's contract — particularly as regards the nature of the work, the length of probation, and the failure to state a duration not exceeding the twelve months — made it fundamentally inconsistent with supernumerary employment of the kind contemplated by the Staff Rules and Regulations. If the Director-General had really intended to employ the complainant as a supernumerary he ought

to have given him a contract which complied with the Staff Rules and Regulations. He did not. The contract was therefore not one for supernumerary employment even though that was the label it bore.

18. Whatever doubt there might have been at the outset, it was quite clear by April 1995 that the complainant was not regarded as a supernumerary: his work was in no sense casual or temporary, he had received regular advancement, and his transfer to another department had been proposed.

19. Relying on Staff Rule 1.1.01, the Laboratory contends that the terms of the contract prevail over the Staff Rules and Regulations on the grounds that the latter are not "given a superior rank over the provisions in the individual contract". The Tribunal rejects the contention. Not only was the Director-General bound to abide by the Staff Rules and Regulations but the contract itself recognised that it was subject to the Staff Rules and Regulations.

20. The report of the Joint Advisory Appeals Board shows that the EMBL was resorting to the grant of supernumerary contracts even for long-term regular employment as a device to circumvent limits imposed on the recruitment of staff and was so formulating the contracts as to conceal its true relationship with the employees. It has not specifically denied this. Indeed in its reply it accepts that "the present situation of Supernumeraries is unsatisfactory" and states that changes are under consideration. The provision for termination without any statement of reasons and on six weeks' notice was an integral part of the device that it adopted.

21. The term "supernumerary employee" must therefore be disregarded because it was inconsistent with the parties' intent as expressed in the terms and conditions of the contract as well as with the Staff Rules and Regulations.

22. The Tribunal holds that in December 1995 the complainant was not a supernumerary and so his appointment could not be terminated without any statement of reasons on six weeks' notice. But neither might he be regarded as a staff member on a fixed-term, open-ended or indefinite contract. He had no right to the renewal of his appointment, and it does not appear from the evidence that the Laboratory would have renewed it had the proper procedure been followed.

23. As for the complainant's plea that the notice of termination should have been signed by the Director-General, Staff Rule 1.1.05 empowers the Director-General to delegate his authority and by a memorandum dated 1 December 1995 he authorised the "head of Human Resources" — i.e. the head of Personnel — to sign such notices.

24. The conclusion is that the intention that both parties formed, if not at the beginning, then at the latest by 1995, was — to quote Judgment 701 — that "the complainant should be employed for as long as his services were required and he was willing to give them", and that to an agreement of that character "the law adds the term that reasonable notice of termination must be given". The complainant is entitled to an award of damages for the lack of such notice, and the amount is set *ex aequo et bono* at 35,000 German marks.

25. He is also entitled to an award of costs.

DECISION

For the above reasons,

1. The EMBL shall pay the complainant 35,000 German marks in damages.
2. It shall pay him 8,000 marks in costs.
3. His other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

Wm Douglas

WILLIAM DOUGLAS

MICHEL GENTOT

MARK FERNANDO

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-THIRD SESSION

***In re* Mukungurutse** **Judgment 1635**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Esau Mukungurutse against the International Labour Organization (ILO) on 14 August 1996 and corrected on 28 September 1996, the ILO's reply of 4 February 1997, the complainant's rejoinder of 6 March and the Organization's surrejoinder of 30 April 1997;

Considering Articles II, paragraph 5 and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of Zimbabwe, joined the staff of the ILO on 1 November 1994 as a budget and finance officer at grade P.3 under a one-year fixed-term appointment. He was assigned to the Organization's Regional Office for Africa at Abidjan, in the Côte d'Ivoire.

Relations with his first-level supervisor soured. On 5 October 1995 he lodged a request for review under Article 13.1 of the Staff Regulations alleging improper treatment by that supervisor. Also on 5 October he and four colleagues sent a "petition", under Article 13.1, to the Assistant Director-General responsible for ILO activities in Africa, who is the Regional Director, levelling allegations against their supervisor. On the strength of a bad report dated 23 November 1995 on his performance the Administration extended his appointment by only three months. Having submitted comments on the report to the Reports Board, he filed a 13.2 complaint on 27 December 1995 against that decision.

In comments dated 12 March 1996 the Reports Board found no reason to keep him on. By a minute of 29 March 1996 the Regional Director gave him formal notice of the Director-General's decision not to extend his appointment beyond 31 May 1996.

In a letter of 24 May 1996 the complainant submitted a second 13.2 complaint to the Director-General against the appraisal of his performance and the decision not to extend his contract beyond 31 May. He asked for the suspension of those decisions and of the arrangements for his return home until his complaints had been settled.

In a reply of 31 May by electronic mail the Director promised him a decision from the Director-General on his internal "complaints" as soon as possible but said that his repatriation would go ahead. That is the decision he impugns.

B. The complainant says that the impugned decision shows mistakes of fact and of law. He alleges breach of the rules on performance appraisals, failure to take account of essential facts, the drawing of mistaken conclusions from the evidence, misuse of authority and personal prejudice.

He wants the Tribunal to set aside the impugned decision; reinstate him or, failing that, grant him material damages in an amount equivalent to what he would have earned since the date of "dismissal"; pay him 3,100 United States dollars to cover the cost of transporting his motor vehicle; award him the amount — $2,000 — which the ILO deducted from his repatriation allowance; and grant him $150,000 in moral damages and $15,000 in costs. He seeks an apology from the Director-General and rectification in writing of his performance report and the records of the internal appeal proceedings.

C. In its reply the ILO contends that the complaint is irreceivable on the grounds that the challenged decision is not a final one and the complainant has not exhausted his internal remedies.

On the merits it rebuts most of the complainant's pleas but it acknowledges flaws in the procedure of appraisal. On 3 December 1996 it accordingly reversed the decision not to extend his appointment and says it has offered him ample compensation for any injury he had sustained.

D. In his rejoinder the complainant argues that his complaint is receivable and observes that the Organization has failed to show that the relief it has offered him is adequate. He presses his claims.

E. In its surrejoinder the ILO states that it has extended the complainant's contract until 31 August 1997 in order to "explore the possibility of reassignment". It maintains its objections to receivability and insists that its offer of compensation for moral injury is adequate in view of the complainant's length of service and the Tribunal's past rulings.

CONSIDERATIONS

1. The complainant started working for the ILO on 1 November 1994 under a fixed-term contract for one year. He was a budget and finance officer at grade P.3 in the ILO's Regional Office for Africa at Abidjan. Not until 6 April 1995 was he given the description of his post and not until May 1995 an official briefing about his duties.

2. On 5 October 1995 he filed a request for review under the Staff Regulations saying that almost ever since starting work at Abidjan he had been having "problems" at work with his first-level supervisor, the chief of Regional Administrative Services (C/RAS). On the same day he and four colleagues submitted to the Assistant Director-General responsible for ILO activities in Africa, who is the Regional Director, a petition that levelled serious allegations against the C/RAS. The Regional Director called a meeting on 13 October to discuss the petition. But the complainant never got a reply either to the petition or to his request for review.

3. A report was due on the appraisal of his performance in the first nine months of his service, up to 31 July 1995. It was completed on 23 November 1995 and submitted to the Reports Board. The appraisal was poor. The complainant put his observations to the Board when called upon to do so.

4. In a minute of 17 November 1995 to the chief of the Personnel Planning and Career Development Branch (P/PLAN) the Regional Director recommended extending the complainant's contract by only three months on the grounds of the poor rating of his performance. His contract was so extended. In a first internal "complaint", which he addressed to the Director of the Personnel Department in a memorandum dated 27 December 1995 he challenged that decision. In support of that appeal he made several serious allegations against the C/RAS of unfair treatment and treatment inconsistent with the terms of his contract and contended that the decision was in "retaliation".

5. In a memorandum of 28 January 1996 to the chief of P/PLAN the Regional Director observed that the complainant's "overall performance" and conduct had still not proved satisfactory and, as the first extension was to expire at the end of that month, recommended letting him have another extension for "winding up".

6. Having reviewed all the submissions made to it, the Reports Board issued comments on 12 March 1996: it noted that the complainant was still on probation and concluded that it had "no grounds to question" the Regional Director's recommendation. By a memorandum of 28 March 1996 the chief of P/PLAN sent him the Board's comments and informed him that the Director-General had decided not to extend his contract beyond 31 May 1996.

7. By an electronic mail message of 18 April 1996 to the complainant the Director of the Personnel Department acknowledged that taking a decision on his appeal of 27 December 1995 — referred to in 4 above — was desirable before his contract expired. In a letter of 23 May 1996, however, she told him that that would not prove possible and that the decision not to renew his contract was not suspended. By a letter of 24 May the complainant filed a second internal "complaint" against the appraisal of his performance and the decision not to extend his contract beyond 31 May 1996. He alleged many flaws in the process of appraisal, mistakes of fact and of law and serious personal prejudice on the part of the C/RAS. Observing that those decisions were "based on a Reports Board recommendation which is itself based on a flawed performance appraisal", he asked that the decisions, and the arrangements for his repatriation, be suspended.

8. By an electronic mail message of 31 May the Director told him that the "contents" of her letter of 23 May 1996 stood.

9. Another two months went by without any decision on either of his internal appeals, of 27 December 1995 and 24 May 1996. On 14 August 1996 he posted this complaint and thereby filed it with the Tribunal. On the complaint form he has identified as "the challenged decision" an express one of which he says he had notice on 31 May 1996. He claims:

(a) the quashing of the decision of 28 March 1996;

(b) reinstatement as from 1 June 1996 or damages;

(c) reimbursement of 3,100 United States dollars, the cost of transportation of a vehicle to Abidjan and then to Harare;

(d) the refund of $2,000, a sum deducted from his repatriation grant;

(e) $150,000 in moral damages;

(f) $15,000 in costs; and

(g) a written statement by the Director-General rectifying the false allegations in the performance appraisal report and connected documents and a written apology by him for the harm caused to the complainant.

10. The Director-General having reviewed both his internal complaints, the Director of Personnel wrote him a letter on 3 December 1996 to convey the Director-General's view that he had "adequately substantiated most though not all" of the allegations of unfair and improper treatment that he had made in support of his first complaint; and that, as to his second one, "certain procedural errors" had been made in the process of appraisal and that the facts on which the appraisal had been based "were not sufficiently established"; the Director-General had therefore decided to "quash" the non-renewal, and so to deem his appointment to have been renewed for one year, and to remove all documents relating to the appraisal from his personal file. In the Director-General's view, however, it was possible neither to reinstate him in the Regional Office — "due to the deterioration in the working relations experienced" by him — nor to find him a suitable position elsewhere. The Director-General had therefore decided to terminate his appointment at 31 January 1997 under Article 11.4.1(d) of the Staff Regulations:

> "The Director-General may terminate the appointment of a fixed-term official -
>
> ...
>
> (d) if the necessities of the service render impracticable the use of the official in the duties or at the duty station assigned to him."

He would then be paid under Article 11.4.3 a termination indemnity equivalent to five weeks' salary. The Director-General further proposed to pay him the equivalent of one year's pay in moral damages in full settlement of his claims, repay the $2,000 deducted from his repatriation allowance and grant him 500 Swiss francs in costs.

11. The complainant answered the Director's letter in one dated 22 December 1996 in which he objected to the termination of his appointment. The Director wrote to him again on 22 January 1997 to say that the Director-General deemed his contract to have been renewed for one year, up to 31 May 1997; would put him on special leave with pay "in the

hope that an appropriate assignment is found"; would pay him the equivalent of three months' remuneration for moral injury; and would grant him a reasonable amount in costs up to 1,000 Swiss francs upon submission of evidence. The Director explained that if no "appropriate assignment" were found his contract would expire at 31 May 1997 and that, though his status thereafter remained uncertain, it would form "the subject of a decision in due course against which [he] would have a right to appeal".

12. Being dissatisfied with the terms of the Director's letter of 22 January 1997, the complainant asks the Tribunal in his rejoinder to rule on his complaint.

13. In its surrejoinder the defendant states that "in order to give the Office more time to explore the possibility of reassignment, the complainant's contract has been renewed for three more months, i.e. to 31 August 1997".

Receivability

14. In its reply the ILO pleads that the complaint is irreceivable on the grounds that the complainant is "unambiguously purporting to impugn an express decision" — the electronic mail message of 31 May 1996 — and not an implied one, because he says in the complaint form that Article VII(3) of the Tribunal's Statute is "not applicable". That message — says the ILO — merely confirmed that his internal complaint did not have the effect of suspending either the non-renewal of his contract or his repatriation; it did not purport to respond to his first internal complaint but "simply confirmed the decision of non-renewal" notified on 29 March 1996; it was "not even a preliminary decision ... let alone a final decision".

15. Yet the ILO recognises that the defect "could have been ... cured by proper drafting" of the complaint form, that the complainant did contest the decision of 29 March 1996 by his valid internal complaint of 24 May 1996 and that the present complaint could have been lodged in accordance with Article VII(3) of the Tribunal's Statute against the implied rejection of that internal one. It acknowledges, too, that "in Judgment 1546 [*in re* Randriamanantenasoa] under 1, the Tribunal took a flexible approach" in interpreting pleadings that were unclear.

16. The several decisions that have affected the complainant cannot be viewed in isolation from each other. The report dated 23 November 1995 declared his performance unsatisfactory, and the result was a short extension

of contract. The Reports Board having endorsed the appraisal in its "comments" of 12 March 1996, there came the decision of 28 March not to renew his contract beyond 31 May 1996; and on that day there was the electronic mail message refusing to stay his repatriation. To challenge only that decision of 31 May would have been futile. Though that is the one he says he is challenging, he is necessarily impugning also the decisions in the chief of P/PLAN's memorandum of 28 March 1996 about performance appraisal and non-renewal on which the decision of 31 May was based. The conclusion is that the complaint is receivable.

The merits

17. As set out in the Director of Personnel's letter of 3 December 1996 about the complainant's two internal complaints, the Director-General's conclusions establish that there were flaws both in the process of appraising his performance and in the decision not to renew his contract. The inordinate delay in giving him a job description and a briefing, the unfair and improper treatment of him by the C/RAS and the failure to respond to his requests of 5 October 1995 for review, tend to bear out his charge of personal prejudice.

18. The Director-General having already extended the complainant's contract to 31 August 1997, the Tribunal need make no further order as to renewal beyond 31 May 1996 or as to the appraisal of his performance.

19. The complainant plainly did suffer moral injury. Under this head the Tribunal awards him *ex aequo et bono* an amount equivalent to a total of six months' salary and allowances, instead of the three offered to him.

20. The ILO having refunded and the complainant having accepted the sum of $2,000 docked from his repatriation grant, that claim has been satisfied and need not be entertained.

21. As for his claim to reimbursement of the cost of transporting a vehicle, he omitted, as the ILO points out, to put forward that claim in any internal complaint. It is therefore irreceivable under Article VII(1) of the Tribunal's Statute on the grounds of his failure to exhaust his internal remedies.

22. His claims to a written statement and to an apology from the Director-General fail because the Tribunal is not competent to grant redress of that kind.

23. Since he has succeeded, at least in part, he is entitled to an award of costs, and the amount is set at 8,000 Swiss francs.

DECISION

For the above reasons,

1. The ILO shall pay the complainant an amount equivalent to six months' salary and allowances in moral damages.
2. It shall pay him 8,000 Swiss francs in costs.
3. His other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

Wm Douglas

WILLIAM DOUGLAS

Michel Gentot

MICHEL GENTOT

MARK FERNANDO

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-THIRD SESSION

***In re* Desbiolles** **Judgment 1636**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Joël Desbiolles against the International Telecommunication Union (ITU) on 26 June 1996 and corrected on 29 July, the ITU's reply of 11 October, the complainant's rejoinder of 6 November and the Organisation's surrejoinder of 10 December 1996;

Considering the applications to intervene filed by Mrs. Hélène Eckert, Mr. Jacques Fonteyne, Mr. Rufino Hernandez and Mr. Jorge Schifferli on 27 September 1996;

Considering Articles II, paragraphs 3, 5 and 7, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Frenchman, is an operator in the Reprography Service of the ITU's Department of Conferences and Common Services.

Late in 1994 the Union held elections to appoint participants' representatives to the ITU Staff Pension Committee of the United Nations Joint Staff Pension Fund. On 1 December 1994 the Staff Council asked the secretary of the Staff Pension Committee to quash the elections on the grounds that the balloting had been unreliable. The request was not granted.

On 16 December the scrutineers published the results of the elections. The complainant had been elected.

On 19 December 1994 the Staff Council sent a petition to the chairman of the Pension Committee and the Secretary-General of the ITU asking that the elections be declared null and void and the results cancelled. On 17 February 1995 the Legal Adviser reported to the Secretary-General at his request on the issues raised by the petition. His recommendation was not to quash the elections but to "set up a working party as rapidly as possible to be responsible for drafting suitable election rules and procedures for the ITU ... to be applied at the next election scheduled for 1997". The Secretary-General endorsed the conclusions of the report.

On 6 June 1995 two candidates who had not been elected went to the Appeal Board asking that the elections be quashed. The Board reported to the Secretary-General on 1 December 1995. It concluded that "the elections should have been declared null and void once there was unanimity about flaws and irregularities in the voting procedure". Since it could not agree on any one recommendation, however, it put three to the Secretary-General: not to quash the election results; to quash them; or to hold "early" elections at the beginning of 1996, but without quashing the results of December 1994. In a memorandum of 20 December 1995 the Secretary-General decided to uphold the results of the 1994 elections, set up a working party to draft procedures for the election of participants' representatives to the Pension Committee and hold new elections as soon as the arrangements had been worked out.

On 24 January 1996 the complainant asked the Secretary-General, on behalf of the participants' representatives elected to the Pension Committee, to say by what authority he might order new elections and shorten the prescribed three-year term of the representatives in office. In a memorandum of 31 January 1996 the Secretary-General replied that he had authority so to act under Article 6(b) of the Pension Fund Regulations:

> "The elected members and alternate members of the Committee shall hold office for three years or until the election of their successors and shall be eligible for re-election ..."

On 1 February 1996 the complainant applied for review but the Secretary-General refused in a memorandum of 15 March 1996. On 20 March the complainant asked him to waive the internal appeal procedure and allow him to go straight to the Tribunal. The Secretary-General agreed in a memorandum of 27 March 1996. That is the decision the complainant says in the complaint form that he is impugning.

The procedure for the election of representatives on the Staff Pension Committee was published in Service Order 29/Rev.1 of 31 May 1996.

B. The complainant submits that the Secretary-General acknowledged more than once that the elections of December 1994 had been proper and decided not to quash them. In any event the Secretary-General misconstrued the rules which he says empower him to hold early elections. The complainant contends that the view expressed by the ITU's Legal Adviser in his report of 17 February 1995 was the same as his own: Article 6(b) of the Pension Fund Regulations lays down "a fundamental rule made up of three components, namely the three-year term of office, the eligibility for re-election of a member or alternate member and the prolongation of the three-year term of office until successors have been effectively and properly elected". The complainant concludes that the Secretary-General acted *ultra vires* and in breach of the independence of the participants' representatives. The Legal Adviser's opinion was that Article 6(c) of the Pension Fund Regulations required every member organisation of the joint pension scheme to make rules not only for electing members representing participants but also for appointing members to represent the executive head and for electing members to act on behalf of the organisation's decision-making body. The Secretary-General did not fully discharge that obligation since the ITU's rules, made without consulting the Pension Committee, govern only the election of participants' representatives.

The complainant asks the Tribunal to quash the Secretary-General's decision to hold special elections of participants' representatives on the Pension Committee; to quash the service order setting out the procedure for the election of participants' representatives to the Pension Committee and to order the Organisation to lay down rules and procedures, in conjunction with the Committee, for electing or appointing all its members.

C. The Union's main plea in its reply is that the Tribunal is not competent to hear the case. The complaint and the applications to intervene are about how to construe and apply Article 6 of the Regulations of the Pension Fund. According to Regulation 11.2 of the ITU's Staff Regulations and Rule 11.2.1 of its Staff Rules, it is the United Nations Administrative Tribunal that is competent to hear disputes concerning the Fund.

By way of subsidiary plea the Union submits that the complaint is premature. The decision of 20 December 1995, which was taken in the context of another dispute, causes the complainant no injury in that his term of office has not yet ended. Only a decision issuing the results of the early elections will afford him any cause of action. The purpose of the decision of 20 December was to sort things out fairly. As for the service order issuing rules of procedure for electing the participants' representatives, it does not amount to an individual decision causing him injury since it has no bearing on the length of his term of office. In answer to his plea of breach of Article 6(c) of the Pension Fund Regulations the Union contends that that rule does not require it to lay down a single procedure for electing all members of the Pension Committee.

D. In his rejoinder the complainant submits that the complaint is not about the Pension Fund but about elections to the Pension Committee; so the Tribunal does have jurisdiction.

The plea that his complaint is premature and therefore irreceivable is mistaken and, besides, is a procedural quibble that shows bad faith.

On the merits he submits that the trouble that the elections caused was not serious enough to warrant quashing them. By holding early elections the Secretary-General made a mistake of law and overlooked material facts or, at the least, drew wrong conclusions. So a ruling on the case requires no interpretation of the Pension Fund Regulations, and the issue of receivability does not arise.

In no circumstances can the service order give rise to individual decisions. It causes him injury in itself because it is in breach of freedom of association and an abuse of authority.

Lastly, he explains that it was never his intention to demand a single procedure for constituting the Committee; his point is that the Secretary-General has not fully discharged his obligation.

E. In its surrejoinder the Union refutes the complainant's arguments and presses its pleas.

CONSIDERATIONS

1. Elections were held in December 1994 to appoint representatives of the staff of the Union to its Staff Pension Committee. Despite strong objections to the ballot the Secretary-General confirmed the results after consulting the Legal Adviser. An appeal went to the Appeal Board for the quashing of the elections, and the Board held that "the elections should have been declared null and void once there was unanimity about flaws and

irregularities in the voting procedure". It did not, however, agree on the recommendations to be put to the Secretary-General. On 20 December 1995 the Secretary-General decided, instead of quashing the elections, to set up a working party to see what reforms of the procedures were needed and to hold new elections when the reforms had been made. The representatives elected in 1994 would stay in office until the results of the new elections were issued. The complainant, who is one of them, is challenging the Secretary-General's authority to shorten the prescribed term of elected members of the Pension Committee. He seeks the quashing of the decision of 20 December 1995 on the grounds that it ordered premature elections. Four other staff representatives have applied to intervene.

2. The main issue - and the defendant pleads it - is the Tribunal's jurisdiction. The ITU acknowledges that as an official of an organisation that has recognised the Tribunal's competence the complainant may file a complaint. Its plea is that the Tribunal is not competent *ratione materiae*, the case being one that affects the United Nations Joint Staff Pension Fund.

3. According to Regulation 11.2 of the Staff Regulations -

> "A staff member shall be entitled to appeal to the Administrative Tribunal of the International Labour Organization, as provided in the Statute of the Tribunal, and to the United Nations Administrative Tribunal with regard to appeals concerning the United Nations Joint Staff Pension Fund."

Staff Rule 11.2.1 says that the body competent to hear "cases affecting the United Nations Joint Staff Pension Fund" is the United Nations Tribunal. It reads:

> "Appeals with which the United Nations Administrative Tribunal may have to deal are those alleging non-observance in form or substance of the provisions of the Regulations of the United Nations Joint Staff Pension Fund."

4. It is not easy to comply with the rules about jurisdiction in a case like this one, in which the executive head took the impugned decision not on behalf of the Pension Fund but in the exercise of the authority he has, or believes he has, to act for the organisation. The dispute is about the composition and functioning of a pension committee set up under Article 6 of the Fund's Regulations. And, according to Article 4 of the Regulations, pension committees of member organisations participate in the administration of the Fund. Every international organisation that belongs to

the United Nations Joint Staff Pension Scheme must set up such a committee and — so says 6(c) — "make rules for the election or appointment of the members and alternate members of its committee". Indeed it was the Union's failure to make rules for electing members that prompted the objections to the elections in 1994 and to this dispute.

5. It is hardly arguable that the representative character of the elected members of a pension committee and the length of their term of office are not issues "affecting the United Nations Joint Staff Pension Fund", to quote Rule 11.2.1 of the ITU Staff Rules. Besides, the complainant himself is arguing that the case is about the Secretary-General's failure to observe Article 6 of the Fund's Regulations. That alone affords reason enough to declare, in line with Rule 11.2.1(b), that the Tribunal lacks jurisdiction.

6. Although the impugned decision was not taken by any authority of the Fund, the Tribunal does not believe that it may entertain this case.

7. The Union cites Article II, paragraph 3, of the Tribunal's Statute, which says it is competent to hear "any complaint of non-observance of the Staff Pensions Regulations or of rules made in virtue thereof". That provision alludes to the staff pension scheme of the League of Nations and so is in any event immaterial.

8. Since the complaint fails, so too do the applications to intervene.

DECISION

For the above reasons,

The complaint and the applications to intervene are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

WILLIAM DOUGLAS MICHEL GENTOT JULIO BARBERIS

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-THIRD SESSION

In re Fahmy (No. 3) **Judgment 1637**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Yehia Fahmy against the United Nations Industrial Development Organization (UNIDO) on 13 June 1996, UNIDO's reply of 6 September, the complainant's rejoinder of 19 November 1996 and the Organization's surrejoinder of 25 February 1997;

Considering Article II, paragraphs 2 and 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this dispute, which began ten years ago, appear under A in Judgments 993 and 1284 on Mr. Fahmy's first and second complaints. In Judgment 1284 of 14 July 1993 the Tribunal held that the report of the Medical Board convened during the internal procedure showed several flaws, but that it was unable to declare the complainant's ailments attributable to the performance of his official duties on the grounds that it might not substitute its own assessment for the Board's. It therefore sent the complainant back to the Organization for resumption of the proceedings for considering his claim to compensation in accordance with Articles 16 and 17 of Appendix D to UNIDO's Staff Rules. This complaint impugns the Director-General's final refusal to treat the complainant's illness as service-incurred.

By a letter of 1 October 1993 the secretary of the Advisory Board on Compensation Claims told the complainant that in accordance with Judgment 1284 the Board had again taken up his case; that since a medical board would again be convened under Article 17 of Appendix D to the Staff Rules he should name a doctor to sit on it; and that the medical board's terms of reference were to assess his health at the date of separation, 31 October 1987, and thereafter, taking into account his medical and family history and the development of his condition, especially from October 1986 until October 1997, and to determine whether the harassment he was alleging could have caused any deterioration in his health and whether there was medical evidence that such deterioration was the direct or indirect result of the harassment.

In its report of 9 September 1994 the medical board found that the complainant's family history was irrelevant to assessment of his state of health, that he had been unfit for employment since 31 October 1987, that the harassment might have caused deterioration in his health and that there was medical evidence to establish that indeed it had. In a report dated 17 March 1995 the chairman of the Advisory Board observed that, since the vote was evenly split between the Director-General's and the participants' representatives, the Board could make recommendations neither as to whether the complainant's illness was service-incurred nor as to compensation.

The Managing Director of the Division of Administration wrote to the complainant, also on 17 March, to say that the Director-General saw no reason to depart from the earlier decisions declaring his illness not attributable to the performance of his duties. The complainant objected in a letter of 18 May to the Director-General in which he stated that he took it that the decision was final and he could therefore go straight to the Tribunal; if not, his letter should be treated as a request for review. In his reply of 6 July the Director-General rejected the request and informed the complainant that he might appeal to the Joint Appeals Board. The complainant did so on 1 September 1995.

In its report of 11 March 1996 the Appeals Board held that in the absence of formal investigation by the Administration there were no grounds for supposing that the Director-General should have taken the complainant's allegations as fact. The Director-General having neither drawn plainly mistaken conclusions from the evidence nor misused his authority, the Board recommended rejection.

By a memorandum of 2 April 1996 - the impugned decision - the secretary of the Appeals Board told the complainant that the Director-General had rejected his appeal.

B. The complainant contends that the Director-General drew clearly wrong conclusions from the reports of the medical board and the Advisory Board's chairman and from information brought to his attention in the appeal proceedings. He alleges that the Organization originally admitted to the writing of a report on an investigation into his supervisor's treatment of him, only to deny it later. He gathers that it has destroyed the report and other material evidence. The then Director of Personnel confirmed before the Advisory Board and the Appeals Board that the complainant had suffered harassment. He also certified that he had told the Appeals Board of the disappearance of the report on the investigation and of the reasons why it had been destroyed. The medical board itself recognised that the harassment had so harmed the complainant's health that he had had to stop working.

In his submission the impugned decision shows bias: the report on the investigation was disposed of at the instigation of a friend of his supervisor's, who had been Deputy Director-General at the time. By concluding that it could make no recommendations the Advisory Board too showed bias. So did the Appeals Board in its wording of the questions it thought the Director-General should bear in mind in reaching a decision. Besides, the Director-General acted in breach of good faith: he held up the case by resorting to dilatory tactics. The Organization thus caused him serious moral injury. And he plainly suffered material injury since he had to stop working before he was due to retire whereas UNIDO would undoubtedly have extended his appointment beyond the prescribed age of retirement.

He asks the Tribunal to quash the decision of 2 April 1996 and accordingly to order the Organization:

> "- to apply to the complainant in full and as from 16 March 1987 the rules relating to compensation for total disability in Appendix D to the Staff Rules (including Article 11.4 thereof);
> - to pay the complainant the various sums due in Austrian schillings, to be reckoned at the various rates of exchange against the United States dollar prevailing at the due dates;
> - to pay compound interest at the rate of 10 per cent a year on the various sums due to the complainant;

> - to pay the complainant a sum in moral damages equivalent to three times the annual amount of his pensionable remuneration (applicable as at the day of payment) corresponding to his last grade and in-grade step;"

He seeks costs.

C. In its reply UNIDO submits that the Director-General properly appraised the information at his disposal and drew no mistaken conclusions from the evidence in making his final decision, which he took in the lawful exercise of his discretion. The decline in the complainant's health could not conceivably have been the direct outcome of the incidents he sees as harassment. The behaviour that he attributed to his supervisor in a memorandum of 10 March 1987 was just the sort of everyday occurrence that anyone may have to put up with when he has a new supervisor. Though he may have undergone some stress in his four-and-a-half months' contact with that supervisor, he offers not a jot of evidence of any harassment that might have been the direct cause of his illness. The medical board's findings were speculative and gratuitous.

Even though an investigation was made and the conclusion was that the complainant had suffered no harassment, there was no written report. The evidence that the former Director of Personnel gave before the Joint Appeals Board was mistaken. The complainant's charges of bias are groundless. There is none to be inferred from the Advisory Board's conclusion that it could make no recommendations: "that correctly reflected the situation of the Board in the light of its rules of procedure". The proceedings took a long time because the Organization wanted to let the complainant take part and to meet his wishes as far as possible. It committed no breach of good faith.

Judgment 993 dismissed his claim to material damages for frustration of his expectation of renewal of contract beyond the age of retirement. So the matter is *res judicata*.

D. In his rejoinder the complainant accuses the Director-General of substituting his own assessment for the medical board's. He maintains that papers were indeed destroyed. Citing the evidence given by two members of the medical board whom he questioned, he submits that the board's report leaves no doubt about the causal link between the treatment of him and his illness. He presses all his other pleas.

E. In its surrejoinder UNIDO submits that the medical board did not conclude in its report that there had been actual harassment. What the complainant alleges to be harassment amounts to "everyday occurrences in any office" that cannot be regarded as the direct cause, in the legal sense, of his illness and later total disability.

CONSIDERATIONS

1. The complainant, an Egyptian who was born in 1927, joined UNIDO in 1969 and held a series of appointments until he retired in 1987. In his first complaint to the Tribunal he challenged a decision not to extend his appointment beyond 31 October 1987, but Judgment 993 of 23 January 1990 dismissed his claims as irreceivable. The Organization rejected a request that he had made, in accordance with Article 17(a) of Appendix D to UNIDO's Staff Rules, for review of a decision not to treat as service-incurred several cardiac and other disorders which he attributed to stress caused by the behaviour of his first-level supervisor. In a second complaint he sought the quashing of that decision. Although the Tribunal declined to rule on whether his ailments were service-incurred, it held in Judgment 1284 of 14 July 1993 that the proceedings before the medical board showed flaws, inconsistencies and omissions. It sent the case back to the Organization for resumption of the proceedings for considering his claims. In this complaint, his third, he is impugning a decision of 2 April 1996 by the Director-General of UNIDO confirming, on the recommendation of the Joint Appeals Board, decisions of 17 March and 6 July 1995 not to attribute the deterioration in his health to the performance of his duties.

2. The complainant seeks the quashing of that decision on the grounds that the Director-General drew clearly wrong conclusions from the evidence, showed bias and was in breach of good faith. His other claims are to the application to him as from 16 March 1987 of the rules in Appendix D to the Staff Rules on compensation for total disability; payment, with interest, of the amounts due to him under those rules; moral damages; and costs.

3. The pleadings must be read in the context of the conclusions of the bodies to which the case has been referred: the medical board, the Advisory Board on Compensation Claims and the Joint Appeals Board.

4. In line with Judgment 1284 the Advisory Board took up the case again on 14 September 1993. It decided to convene another medical board. Its terms of reference were set out in a text of which paragraph 2 read:

> "(a) Assessment of the claimant's state of health at the time of separation on 31 October 1987 and thereafter, taking into account the medical and

> family history of the patient and the development of his condition in general and during the period from October 1986 to October 1987 in particular.
>
> (b) The claimant alleges that harassment and inhuman treatment took place at work. Could harassment as alleged cause a deterioration of health as claimed taking into account the level of stress as always present in a work situation at the level of responsibility of the claimant?
>
> (c) Is there medical evidence that the deterioration of health was the direct or indirect result of the alleged harassment taking into account the medical history under (a) above and the level of stress under (b) above?"

5. After some difficulty the medical board was at last set up. It concluded as follows in its report of 9 September 1994:

> "(a) In this particular case the family history is irrelevant. Even viewed retrospectively, we state he was unfit for employment on 31 October 1987 and has remained so since.
>
> (b) Yes, this harassment could cause the deterioration of health as it took place.
>
> (c) Yes there is medical evidence that the deterioration of health was definitely influenced for the worse by the harassment taking into account to 2(a) and 2(b).
>
> We can give no precise percentage but it was clearly a substantial influence."

6. The board's report was put to the Advisory Board, which met several times. The minutes of its 23rd meeting held on 27 September 1994, show that at the outset it acknowledged the decline in the complainant's health as partly due to his working conditions. He came by the text of those minutes and has produced them even though they were set out in an internal memorandum that should have remained privileged. The Organization objects and in its reply asks the Tribunal to disregard them. Yet the memorandum forms part of the case records, the complainant did not obtain it by deceit, its authenticity is not in dispute, and in citing it the Organization seeks to belittle its importance. There are no grounds for striking out a text that is material to the case and that in any event the Tribunal might have ordered the defendant to disclose. Besides, it affords no conclusive evidence of the Board's opinion, which the Board did not reach until a later meeting and which appear in its chairman's report of 17 March 1995.

7. Also at its meeting of 27 September 1994 the Board agreed on the following finding:

> "after having taken into full consideration the conclusions of the second Medical Board and taking also into account the fact that the complainant is fully incapacitated, [it] recognized that the work situation had an influence on the claimant's deterioration of health, but could not readily come to a quantification of the term 'substantial influence' for the purpose of determining an amount of compensation. [It] endorses that endeavours should be made to negotiate an amicable settlement at the latest by 30 November 1994, failing which a meeting will be called ... in early December 1994 to consider the compensation to be awarded under App. D."

But there was no negotiation and so no "amicable settlement". And, though the Board met again in December 1994, it could not agree on any recommendation to the Director-General.

8. The report of 17 March 1995 by its chairman distinguishes the views of the Director-General's representatives and those of the representatives of the participants in the United Nations Joint Staff Pension Fund. The former found no evidence of the alleged harassment, the medical board report shedding no new light on the question, which was not covered by its terms of reference anyway; so there was no telling whether the worsening of the complainant's health was due to the performance of his duties. The participants' representatives held, on the contrary, that the Organization was liable for the complainant's feeling harassed because of the attitude of his supervisor — one of the representatives, who had been Director of Personnel at the time, described the supervisor's behaviour as "worse than harassment" — because there was medical evidence to establish that the complainant's working conditions had been largely to blame for his poor health. Had his health gone into decline earlier and not just before his sixtieth birthday, he would have been declared an invalid and got a full pension. So the participants' representatives would grant him compensation under Appendix D to the Staff Rules. Their proposal having been put to the vote but not carried, the Board concluded that it could make recommendations neither as to whether his illness was service-incurred nor as to whether he should get compensation under Appendix D.

9. The Director-General thereupon wrote the complainant a letter on 17 March 1995 rejecting his claims on the grounds that there was no reason to review the earlier decisions endorsing recommendations made by the Advisory Board at its 7th and 12th meetings.

10. The complainant appealed against that decision and then against a decision of 6 July 1995 rejecting his appeal. The Joint Appeals Board met no fewer than seven times from 13 December 1995 until 26 February 1996.

On 11 March 1996 it recommended rejecting his second appeal on the grounds that the Director-General had neither drawn clearly wrong conclusions from the evidence nor acted in bad faith nor offended against the complainant's dignity.

11. The Director-General decided on 2 April 1996 to endorse the Board's recommendation and reject the appeal, thereby confirming the position he had held to from the outset. The material issue is whether that decision is lawful. He was bound neither by the medical board's conclusions nor by the position of the Advisory Board — which had made no recommendation at all — and had broad discretion in the matter. Not but what he was of course bound to bear all the material evidence in mind and not to draw clearly wrong conclusions from it.

12. The Tribunal holds that some of the material evidence was misconstrued or even ignored.

13. First, the medical board's conclusions are much more to the point than the Organization allows. True, the board did not say in so many words that there had been harassment, an issue outside its terms of reference anyway. But, after hearing the complainant and going through all the records, it did find medical evidence to show that his health had been "influenced for the worse by the harassment". Had its members believed the treatment he was alleging to be irrelevant to the decline in his health they would have said so and not have spoken of the "substantial influence" of "the harassment".

14. Secondly, as the Organization says, the Advisory Board's only formal conclusion is the one in its chairman's report explaining why it had failed to agree. Yet it is odd, to say the least, that in a report intended for the Director-General the Board said nothing of its unanimous conclusion at an earlier meeting that working conditions had damaged the complainant's health.

15. Lastly, the evidence before the Tribunal. particularly the comments by the former Director of Personnel, make it hard to dismiss — as UNIDO does in its surrejoinder — the keen tension between the complainant and his supervisor as "everyday occurrences in any office" or the effect of "action taken in the ordinary run of management and likely to make for the degree of stress that any international civil servant is expected to cope with".

16. The complainant and the Organization disagree as to whether or not there was investigation into his allegations and whether some items of

evidence have vanished; and that dispute has prompted the Organization to produce material evidence, however belatedly. Be that as it may, the Tribunal comes to the following four conclusions:

(a) The decline in the complainant's already poor health was unquestionably attributable to the stress of relations with his supervisor. But there is no determining just how far such stress at work affected him.

(b) The decision of 1 September 1987 not to renew his appointment was a final one and on account of Judgment 993 is beyond challenge. So he may not object to the termination of his appointment on retirement on the grounds that his ailments were partly service-incurred. Besides, the evidence does not suggest that he had any reasonable expectation that the Organization would keep him on after his sixtieth birthday.

(c) Appendix D of the Staff Rules affords him no entitlement to an invalidity pension. The "additional compensation" he claims under Article 11.4 is payable only to a staff member who has to depend on and pay for the assistance of another person or who, if partly disabled, has to undergo vocational rehabilitation. Articles 11.1 and 11.2, which deal with total or partial disability attributable to the performance of official duties, do not apply to cases like this one where, after several months' sick leave on full pay, the member does not go back to work and the reason is not that he is unfit but that he has reached the age of retirement and has had to stop work because of a decision no longer subject to challenge.

(d) As was said above, the conditions the complainant suffered in his last few months of work harmed his health. They caused him injury for which he is entitled to redress. Acting by virtue of Article II, paragraph 2, of its Statute and taking account of all the delay in sorting out what was a fairly straightforward case, the Tribunal awards him damages on that count. It sets the amount *ex aequo et bono* at 35,000 Swiss francs, including any interest accrued by the date of delivery of this judgment.

17. The complainant is entitled to an award of 20,000 French francs in costs.

DECISION

For the above reasons,

1. UNIDO shall pay the complainant 35,000 Swiss francs in damages for the injury referred to in 16 above.
2. It shall pay him 20,000 French francs in costs.
3. His other claims are dismissed.

In witness of this judgment Mr. Michel Gentot, Vice-President, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

MICHEL GENTOT JULIO BARBERIS EGLI

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-THIRD SESSION

***In re* Ciaffei** **Judgment 1638**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Laura Ciaffei against the World Health Organization (WHO) on 23 August 1996 and corrected on 1 October 1996, the WHO's reply of 24 January 1997, the complainant's rejoinder of 17 March and the Organization's surrejoinder of 17 April 1997;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Italian who was born in 1939, joined the staff of the World Health Organization on 21 March 1983 under a short-term appointment. She had it renewed several times. On 19 December 1984 she was granted a fixed-term appointment for one year. She continued to have the status of a fixed-term employee until 28 February 1994, when she took early retirement.

By a letter of 24 February 1994, which the Organization says it did not get until 7 February 1995, the complainant asked what her status was in the Staff Health Insurance plan. By a letter dated 9 February 1995 an officer of the Insurance plan told her that she would not have coverage after retirement since she had been a participant for only nine years and two months, the period of her fixed-term appointments, and the minimum period required was ten years.

By letters of 21 February 1995 and 8 January 1996, to which she appended a certificate from the Personnel Office of the United Nations, the complainant asked that by analogy with the United Nations Joint Staff Pension Fund the reckoning of her years of contribution to the Staff Health Insurance plan should include the period she had spent in the employ of the United Nations from 19 January 1981 to 30 October 1982. The Organization refused that request in letters of 1 March 1995 and 7 February 1996 on the grounds that there had been too large a lapse of time between her employment with the United Nations and her appointment at the WHO. On 15 May 1996 the headquarters Surveillance Committee rejected an appeal she had filed on 5 April. That is the decision she is impugning.

B. The complainant contends that the Surveillance Committee ought to have counted the period of her short-term contracts, since that was the only sort of appointment that the WHO could afford to give her at the time. She says that the Organization's asking her to supply evidence of her employment by the United Nations shows its bad faith since the details were already in her personnel file. The difficulty she had in obtaining a certificate from the United Nations accounts for the lapse of one year between her two applications for review of the decision of 9 February 1995.

The complainant seeks reinstatement in the "United Nations Joint Sickness Insurance Fund" or, failing that, the refund of all her health insurance contributions since 1981. She claims 5,000 Swiss francs in "legal and medical costs" incurred since leaving the WHO.

C. In its reply the WHO contends that the complaint is irreceivable on the grounds that the complainant has failed to exhaust her internal remedies. The Surveillance Committee's decision was an administrative one and not final. Article 550 of the rules of the Staff Health Insurance plan afford the possibility of appeal against that decision to the Director-General within sixty days of receiving it. The complainant failed to file any such appeal.

In subsidiary argument the Organization contends that the complaint is devoid of merit. Article 60 of those rules says that someone who wants to remain a participant after retirement must have been contributing for at least ten years as a staff member holding an appointment of one year or more. That clearly precludes taking account of short-term contracts. The period in which the complainant was a participant in the health insurance scheme of the United Nations cannot count because Article 70 of the WHO's Staff Health Insurance rules requires that termination of employment in another organisation should coincide with appointment by the WHO. The Organization says that the complainant is not entitled to claim from the

WHO contributions paid while in the employ of the United Nations. Nor may she claim reimbursement of her WHO contributions because there is no provision for that in the rules, and in any event the contributions afforded her actual coverage. Nor is she entitled to costs.

D. In her rejoinder the complainant contends that other employees of the WHO so harassed her that she had to take early retirement. She says that the Administration customarily allows staff to continue to participate in the Staff Health Insurance plan if they pay up any missing months of contributions. She says that there is no information available about sickness insurance. The Surveillance Committee only briefly discussed her case and thereby denied her "right to health". Article 550 of the rules allows but does not require her to appeal to the Director-General. She presses her claim to the repayment of her contributions, should her main claim be disallowed, on the grounds that she did not "make use" of them and they therefore remain "her property".

E. In its surrejoinder the WHO presses its objections to receivability on the grounds of the complainant's failure to exhaust the internal means of redress. She has, it says, failed to afford any evidence of different treatment in like cases, of harassment by other staff or of cavalier handling of her case by the Surveillance Committee. It points out that she accepted the terms of her short-term contracts and that it is precisely because the period of such contracts does not confer entitlement to coverage after retirement that the contributions are lower.

CONSIDERATIONS

1. The complainant joined the staff of the World Health Organization on 21 March 1983 under a short-term appointment. On 19 December 1984 she obtained a fixed-term appointment for one year and she had it renewed several times to 31 August 1992. She then applied for leave without pay, although she kept her status of fixed-term employee until 28 February 1994, when she took early retirement.

2. She says that she also worked for the United Nations, in Geneva, from 19 January 1981 until 30 October 1982.

3. In a letter of 24 February 1994 she asked the WHO to say what her status in the Staff Health Insurance plan would be after she left. The Organization told her in a reply of 9 February 1995 that to remain a

participant after retirement a staff member must have been a participant for at least ten years and that she did not fulfil that requirement. In a letter of 21 February 1995 she asked the Organization to reckon the period of her participation from 1 February 1981, the date of her first contribution to the United Nations Joint Staff Pension Fund. On 1 March 1995 the Organization pointed out that there were rules for reckoning the period of participation and it confirmed that, not having the ten years required, she would lose coverage on retirement.

4. On 8 January 1996 she asked the Organization to add to the period of her service the time during which she had been working for the United Nations. The Organization rejected her request in a letter of 7 February 1996.

5. On 5 April she submitted to the headquarters Surveillance Committee an appeal against the decision of 7 February 1996. On 15 May the secretary of the Committee told her that it had rejected her appeal.

6. The complainant is impugning the Committee's decision of 15 May 1996 and seeks: (a) her reinstatement in the "United Nations Joint Sickness Insurance Fund"; (b) failing that, the refund of all her health insurance contributions since 1981; and (c) an award of 5,000 Swiss francs in "legal and medical costs" incurred since leaving the WHO.

7. In its reply the Organization submits that the complaint is irreceivable and in any event devoid of merit.

8. Article 550 of the rules of the Staff Health Insurance plan says that the decisions of the headquarters Surveillance Committee are subject to appeal to the Director-General, whose decision shall be final. Moreover, Article VII, paragraph 1, of the Tribunal's Statute says that "A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations".

9. In this case the Surveillance Committee's decision was not "final" since appeal still lay to the Director-General. The complainant filed no such appeal. Her complaint is therefore irreceivable under Article VII(1) of the Tribunal's Statute.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

WILLIAM DOUGLAS MICHEL GENTOT JULIO BARBERIS

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-THIRD SESSION

***In re* Limage** **Judgment 1639**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Leslie Limage against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 4 November 1996 and corrected on 12 November, UNESCO's reply of 18 December 1996, the complainant's rejoinder of 29 January 1997 and the Organization's surrejoinder of 7 March 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of the United States and Belgium who was born in 1946, joined the staff of UNESCO on 18 June 1983 as a programme specialist at grade P.3. At the material time she was working in the Division for the Renovation of Educational Curricula and Structures (ED/ECS) at grade P.4 and held a fixed-term appointment until 31 May 1996.

She took part in drafting a "manifesto" entitled "Towards a gender-inclusive culture through education" in cooperation with the Committee on the Elimination of Discrimination Against Women (CEDAW). On 27 April 1995 the Assistant Director-General for Education, Mr. Power, stopped the translation and processing of the document on the grounds that it contained mistakes. On 17 May 1995 the complainant learnt that work on the manifesto, which had resumed on the same day with leave from Mr. Power, had again been stopped by Mr. Rissom, a German staff member who was Mr. Power's executive assistant. She went to Mr. Rissom's office and in the ensuing quarrel accused him of having "a fascist approach to management" and gave him a Nazi salute. There were two witnesses: Mr. Power and Mr. Rissom's secretary. When the complainant got home that evening she telephoned Mr. Rissom to say that she was sorry. She said so again when she saw him the next day. On 19 May he told her in writing that he accepted her apology and would therefore not tell the Director-General or recommend disciplinary action but that, since he could not go on working with her as if nothing had happened, he had asked to be relieved of the file relating to cooperation with CEDAW. But Mr. Power told the Director-General of the incident, at first orally through the Director of the Director-General's Executive Office, and then in a memorandum of 12 June 1995.

In a memorandum of 4 July the Director of the Bureau of Personnel told the complainant that because of her behaviour towards Mr. Rissom and the fact that she had "caused problems" over cooperation with CEDAW in writing the manifesto the Director-General had decided to dismiss her summarily in accordance with Staff Regulation 10.2 as from 7 July 1995. By a memorandum of 13 July the complainant asked the Director-General to reverse his decision. On 14 September she lodged an appeal with the Appeals Board against the implied rejection of her request. On 13 November the Director of the Bureau of Personnel told her that the Director-General upheld his decision.

The Appeals Board reported on 5 July 1996. It dismissed the charge that the complainant had "caused problems" over cooperation with CEDAW. As for her behaviour towards Mr. Rissom, account should be taken of the apology she had offered him and his acceptance of it. Its conclusion was to recommend that the Director-General review the whole case and consider a lighter penalty.

By a letter of 4 October 1996 the Director-General informed the complainant that after full review he was withdrawing the charge about cooperation with CEDAW but confirming the summary dismissal on the sole grounds of her behaviour towards Mr. Rissom. That is the decision under challenge.

B. The complainant submits that UNESCO acted in gross breach of due process by not giving her any opportunity of answering the charges against her. It did not warn her of the threat of dismissal, tell her of the charges or let her put her case before the decision went through. The letter that the

Assistant Director-General for Education wrote to her on 12 June 1995 states the sole grounds for the dismissal. Yet, as the Appeals Board pointed out, it contained wrong information and was not sent to her until 21 July 1995. Her learning some of the facts *ex post facto* does not purge the breach of due process.

Her subsidiary plea is that the penalty was disproportionate because the single incident involving Mr. Rissom did not amount to serious misconduct warranting summary dismissal, the less so since she tendered a prompt apology and he accepted it.

She asks the Tribunal to quash the decision of 4 July 1995 upheld on 4 October 1996; reinstate her in an equivalent post as from the date of dismissal; award the payment of the salary, allowances and benefits she would have been entitled to from the date of dismissal and up to the date of reinstatement; order the recalculation of her pension entitlements; and award her damages and costs.

C. In its reply the Organization tells of earlier incidents which in its view show that the complainant had already had many brushes with authority. She did have her say. Precedent says that the grounds for a decision do not have to be spelled out when it is first notified to the staff member. The Appeals Board took the view that since the complainant acknowledged her guilt there was no need to let her answer.

As for the proportionality of the penalty to the offence the accusations she made against a fellow staff member before witnesses were serious. It was not the first time she had made improper allusions to Nazism. Her behaviour had a direct consequence for the functioning of the unit since Mr. Rissom had to be relieved of cooperation with CEDAW.

D. In her rejoinder the complainant submits that the earlier incidents recounted by the defendant are immaterial because they did not afford grounds for her dismissal. One of the two reasons for the dismissal proved groundless. The precedents UNESCO cites are irrelevant. It has discriminated against her.

E. In its surrejoinder the Organization maintains that, though the scene with Mr. Rissom was on its own serious enough to warrant summary dismissal, the earlier incidents are relevant because they afford further justification. They show that the Organization was not prejudiced against the complainant but forbearing and lenient, and that her allegations are implausible. Citing written evidence it supplies, it submits that Mr. Power gave the complainant an opportunity to have her say at the time of the incident and she has had many a chance to do so since. The penalty was not disproportionate because her sort of behaviour is utterly inadmissible in an international organisation.

CONSIDERATIONS

1. UNESCO appointed the complainant to its staff in 1983 at grade P.3 and promoted her to P.4 at the end of 1989. When she left she held a fixed-term appointment that was to expire at 31 May 1996 as a programme specialist in the Division for the Renovation of Educational Curricula and Structures. That Division came under Mr. Power, the Assistant Director-General for Education, whose executive assistant was Mr. Rissom, a staff member of German nationality. Her duties included the writing of a manifesto entitled "Towards a gender-inclusive culture through education", a task that was being carried out in cooperation with the Committee for the Elimination of Discrimination Against Women (CEDAW).

2. On 17 May 1995 she had an argument with Mr. Rissom at UNESCO about an office matter. On her own admission she accused him of having "a fascist approach to management" and gave him a Nazi salute. At home that evening, realising she had, as she says, "lost her temper", she telephoned him to offer an apology, and she repeated it to him the next day at the office.

3. On 4 July 1995 UNESCO dismissed her summarily and without warning. In a memorandum of that date the Director of the Bureau of Personnel told her:

> "After having learned that you verbally abused and insulted Mr. Rissom, demonstrated behaviour of extreme intolerance towards him, and caused problems with the Committee on the Elimination of Discrimination Against Women concerning the 'Manifesto', the Director-General considers that you have committed serious faults and has decided to summarily dismiss you, in accordance with Staff Regulation 10.2 and Staff Rule 110.1(a).
>
> Consequently, you shall be separated from the Organization with effect from 07 July 1995."

When she orally asked the Assistant Director-General and the director of her own division for an explanation they told her that they were acting on the Director-General's instructions and could offer her neither information nor help.

4. On 5 July she wrote memoranda to the Director-General and to the Director of the Bureau of Personnel saying that the allegations against her were so unclear that she could not tell for what reason she was being dismissed. By a memorandum dated 13 July 1995 she asked the Director-General to reverse the summary dismissal on the grounds that she had been given neither prior notice of the charges against her nor any opportunity of putting her case and that in any event the disciplinary sanction imposed on her was out of proportion to the circumstances.

5. In a letter to her of 20 July the acting Director of the Bureau of Personnel offered to change the decision to "agreed termination", but she found the offer unacceptable.

6. Under cover of a letter dated 21 July the acting Director sent her, at her request, copies of two documents. The first was a memorandum of 12 June 1995 from the Assistant Director-General to the Director-General reporting that she had "verbally abused and insulted" Mr. Rissom for having consulted the Assistant Director-General about an "already signed memo" before sending it off. The Assistant Director-General added:

> "As I became a witness at the end of the incident, I should like to confirm that Ms. Limage's behaviour of extreme intolerance was personally offensive to one of my closest collaborators and even to one of our Member States, even though she has been repeatedly warned about her unacceptable behaviour.
>
> ... the problems we have had with the 'Manifesto' have been created because Ms. Limage has sought to use CEDAW to push her own agenda (i.e. to install herself as the Coordinator for Women in the Sector) while I have insisted that we listen to CEDAW and address their priority needs.
>
> Regarding women's coordination and the problems in education alluded to in the evaluation report [on the complainant's performance], again most of the difficulties stem from the same source."

The second document forwarded to the complainant was a memorandum that the Director of the Executive Office had sent to the Director of Personnel on 27 June 1995. It said that the Director-General had "decided to proceed with a summary dismissal" of the complainant "for serious misconduct in accordance with the provisions of Staff Regulation 10.2". It instructed the Director of Personnel to tell her of the decision "immediately" and to "proceed with her separation without delay". It concluded: "The Director-General does not expect to receive advice or comments on this decision".

7. Having received no reply to her memorandum of 13 July 1995, the complainant gave notice on 14 September of appeal to the Appeals Board. On 13 November the Director of Personnel sent her a letter about the incident of 17 May 1995 confirming the Director-General's decision and making further allegations. The Board reported to the Director-General on 5 July 1996, a year and a day after the memorandum notifying dismissal.

8. The Board investigated the charge that the complainant had "caused problems" with CEDAW or with the Organization. It held that that charge was quite baseless and it advised the Director-General to "rescind his decision of summary dismissal" on that ground. It then took up the charge that she had "verbally abused and insulted Mr. Rissom". It observed that in support of that charge the Organization had cited "a number of previous unsavoury instances between the appellant and her colleagues". It discounted them, however, on the grounds that none of them had been "acted upon", the "memo of dismissal" did not even refer to them, and the Administration therefore might not rely on them as "justification for the summary dismissal". As to the incident of 17 May 1995 it observed:

> "... this ground has not at all been contested by the appellant at any time and even before the Appeals Board. The appellant has admitted her fault and apologized to Mr. Rissom. Mr. Rissom accepted the apology and did not wish to proceed against the appellant. The Appeals Board is of the opinion that since the misconduct has been admitted there was no need to give any opportunity to the appellant to defend herself. Such an opportunity would have been futile since the misconduct is admitted."

The Board recommended:

> "... in view of [the] non-existence of one of the grounds and due tendering of the apology and its acceptance, the Director-General should reconsider the whole matter, including the imposition of a lesser penalty on the appellant."

9. The Director-General gave the complainant his final decision in a letter of 4 October 1996. He said that he had, on the Board's recommendation, reconsidered her case. He had decided to "drop [the] charge" of misconduct relating to the CEDAW. As to the charge arising out of the incident of 17 May 1995, however, he had "again come to the conclusion that [her] conduct in this regard constituted extremely serious misconduct". He quoted the Board's comment that since she had admitted the misconduct there was no need to give her any opportunity of defending herself. "Such an opportunity", he said, "would have been futile since the misconduct is admitted". He maintained her summary dismissal on account of the incident. That is the decision she is impugning, and she has the same pleas as those she put forward in her internal appeal, namely breach of due process and lack of proportionality.

10. The Organization says in answer to her plea of breach of due process that she had opportunities of putting her own case both before the decision of summary dismissal was notified to her, and again later, before the Director-General took the final decision confirming it.

11. The defendant's argument is mistaken. Before it notified to her the decision of summary dismissal it had brought no charges against her, and she therefore had no case to answer. And once it had made the decision to dismiss her without giving her a prior hearing, it had already acted in breach of due process. It has long been firmly established by precedent that an international organisation must inform the staff member of any charges it is levelling against him and give him the opportunity of answering before it takes any disciplinary action: *audi alteram partem* is a requirement it must observe in all circumstances. The Appeals Board was mistaken in saying that there was no need to give the complainant any opportunity of defending herself. Even though she had admitted to the incident, she did not on that account forfeit her right to be heard, be it to make a plea in mitigation or to give her own version of the facts or to raise any other issue she wished in her own defence. Since the Organization failed to respect that right, the impugned decision cannot stand.

12. Since the complainant succeeds on those grounds, there is no need to entertain her subsidiary plea that the summary dismissal was a disproportionately heavy penalty.

13. The impugned decision being set aside, the case is sent back for the Director-General to take a new decision in accordance with due process. The complainant is entitled to an award of damages equivalent to the total amounts of the salary, allowances and other benefits pertaining to her grade and step as from 7 July 1995, the effective date of the summary dismissal, up to the date at which the Director-General takes the new decision, less any sums received by her from the Organization or in occupational earnings from other sources since 7 July 1995.

14. The Tribunal further awards her the sum of 5,000 United States dollars in damages for the moral injury she has sustained and the sum of 4,000 dollars in costs.

DECISION

1. The impugned decision is set aside.
2. The Organization shall pay the complainant the total of salary, allowances and other benefits pertaining to her grade and step as from 7 July 1995 up to the date at which the Director-General takes a new decision on her case in accordance with due process, less any sums received by her from the Organization or in occupational earnings from other sources since 7 July 1995.
3. The Organization shall pay her 5,000 United States dollars in moral damages.
4. It shall pay her $4,000 in costs.
5. All her other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

Wm Douglas

WILLIAM DOUGLAS

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-THIRD SESSION

***In re* Kogelmann (Nos. 1, 2, 3 and 4)** **Judgment 1640**

THE ADMINISTRATIVE TRIBUNAL,

Considering the three complaints filed by Miss Edith Kogelmann on 18 March 1993 and the fourth filed by her on 14 July 1993 against the International Atomic Energy Agency (IAEA);

Considering the interlocutory order in Judgment 1373 of 13 July 1994.

Considering the complainant's application of 12 November 1993 for the production of further evidence, the IAEA's reply of 19 August 1994 and the complainant's further application of 21 September 1994 for the production of evidence;

Considering the complainant's submissions of 31 March 1995 and the Agency's of 5 April 1995 to Mr. Pierre Droz, the scientific expert appointed by the President of the Tribunal on 16 February 1995 in accordance with point 2 of the ruling in Judgment 1373; the Agency's observations of 12 May and the complainant's of 14 July 1995;

Considering the report submitted by Mr. Droz on 27 November 1995;

Considering the complainant's and the Agency's submissions of 29 March 1996 to Dr. Alois David, the medical expert appointed by the President of the Tribunal, also on 16 February 1995, in accordance with point 5 of the ruling in Judgment 1373; the complainant's observations of 1 May and the Agency's of 8 May 1996; the Agency's further brief of 11 July and the complainant's observations thereon of 26 July 1996;

Considering the report submitted by Dr. David in March 1997;

CONSIDERATIONS

1. These four cases first came before the Tribunal at its 77th Session in 1994. Its interlocutory order in Judgment 1373 of 13 July 1994 sums up the material facts and the parties' pleadings.

The first complaint

2. In her first, and principal, complaint the complainant is seeking an award of full financial compensation for the permanent total disability which she attributes to her working conditions at the International Atomic Energy Agency in Vienna. As is recounted in Judgment 1373, under 6 to 20, the Agency's Advisory Board on Compensation Claims recommended that she undergo tests and, in the light of the findings, came to the view that there was no conclusive evidence that her ailments were attributable to the performance of her official duties. The Director General of the Agency decided on 2 October 1991 to endorse the Board's conclusion and dismiss her claims. After reconsideration of her case by a medical board of arbitration and again by the Advisory Board, the Director General decided on the latter's recommendation to uphold his earlier decision, and the Board's chairman so informed her in a letter of 27 March 1992. She lodged an internal appeal on 15 July 1992. The Joint Appeals Board reported on 16 November 1992 on that appeal. The Director General took his final decision on 22 December 1992 rejecting the complainant's claims. That is the decision she is impugning in her first complaint and Judgment 1373 set it aside for the reasons explained therein and adjourned consideration of the other issues raised in the four complaints pending the completion of inquiries by a scientific expert and then by a medical expert.

3. Judgment 1373 provided, in point 2 of the ruling, for the appointment of the scientific expert to "carry out an investigation to determine the probable levels of exposure of the complainant to xylene and trimethylbenzene" at the material time. It provided, in point 5 of the ruling, for the appointment of the medical expert to:

> "carry out a clinical and psychological examination of the complainant to determine:
>
> (a) the nature and extent of any physical and psychological disorders from which the complainant is suffering or was suffering at the material time;
>
> (b) on the balance of probability whether any of those disorders was attributable to her long-term exposure to xylene or her exposure for

> nearly three years to trimethylbenzene at the level or levels determined by the scientific expert;
>
> (c) to what extent, if any, her work capacity was impaired by disorders wholly or partly attributable to her exposure to toxic substances;
>
> (d) whether she was fit to return to work on the expiry of her sick leave on 17 April 1992 or indeed at any time in 1992 or 1993;
>
> (e) where in the medical expert's opinion some disorder is not wholly or partly attributable to her exposure to toxic substances, identify as far as possible other probable causative factors."

4. The scientific expert, Mr. Pierre Droz, of Lausanne, submitted a report dated 27 March 1995. A copy of it was sent to the medical expert, Dr. Alois David, of Prague, who, in conjunction with other specialists, examined the complainant. His report, which is dated March 1997, is clear, detailed and comprehensive. It reviews the complainant's disorders and ailments. In answer to question (b) — see 3 above — it concludes that "the complainant was exposed only to low levels of xylene and trimethylbenzene that could not cause any of the disorders or diseases from which the complainant was or is suffering". In answer to question (c) the medical expert says that "her work capacity was not impaired by her exposure to xylene or trimethylbenzene". In answer to question (d) he finds that "she was not fit to return to work on the expiry of her sick leave on the 17th April 1992 or thereafter". He discusses in his report the probable causes of the complainant's disorders.

5. In view of those findings the complainant's claim to an award of compensation for permanent total disability cannot succeed.

6. The complainant is, however, entitled to an award of her costs necessitated by the interlocutory order. Such costs are awarded on the same basis as the expenses that she incurred for the purposes of the two expert enquiries. With that sole exception her first complaint is dismissed in its entirety.

The other three complaints

7. The issue in her second case is whether she was fit to return to work on 21 April 1992: see Judgment 1373 under A and C. The Agency granted her sick leave from March 1991 on the strength of successive medical certificates to 11 December 1991, to 3 February 1992 and to 13 March 1992. After examining her on 13 April 1992 the acting chief medical officer of the Agency determined that her sick leave should end at 17 April 1992 and that she would be fit to resume duty on 21 April. She

failed to go back to work at that date. The Director of the Division of Personnel confirmed the decision in a telegram to her on 23 April in which he said that the Agency "reserves the right to take appropriate action", her absence being "unauthorized". The Director confirmed in a letter of 6 May to her counsel that her absence was unauthorised from 21 April but that the case might be referred under Staff Rule 7.04.1(L) to an "independent practitioner" acceptable to both parties.

8. In a letter of 11 May 1992 to the Director the complainant asked for referral under Rule 7.04.1(L). The Director General agreed on 13 May but said that her "pay status" would not be reconsidered until the independent medical practitioner had reported.

9. The independent medical practitioner, Dr. Friedrich Kummer, examined the complainant on 1 July and reported on 2 July that there was no evidence to suggest that she was suffering from any continuing inability to work.

10. After receiving Dr. Kummer's report the Director General informed her in a letter of 16 July that he was upholding the decisions on her fitness to return to work and on her pay status communicated in the Director's telegram of 23 April to her and his letter of 6 May to her counsel. On 14 August she lodged an internal appeal against the decision of 16 July 1992 with the Joint Appeals Board.

The third complaint

11. The complainant's third complaint is about her "pay status". On receipt of Dr. Kummer's report the Director of Personnel wrote her a letter on 10 July 1992 to say that "in the light" of that report —

> "the period from 21 April 1992 until you report for work will be charged to annual leave in accordance with Staff Rule 7.01.1(D) or if your accrued annual leave is insufficient to cover the whole period, to leave without pay. I request you to report for work upon receipt of this letter, failing to do so [sic] the Agency will take appropriate administrative action, which may include non-extension of your contract which expires on 31 August 1992."

12. By a letter dated 14 July the complainant asked the Director General to review that decision. Having got no reply, she lodged another internal appeal on 26 August 1992 against the Director's decision of 10 July.

13. By a letter of 7 August 1992 to the Director General she applied for medical review of her case. By a fax message dated 28 August the Director of Personnel told her that the Agency agreed to review of her

"neuro-psychiatric condition" in accordance with Rule 7.04.1(L), an "independent neurologist/psychiatrist" was to be appointed for the purpose.

14. The Agency extended her contract to 30 September 1992 and, after further extensions, for the last time to 31 March 1993. Having reached the age of retirement, she left the Organisation on the expiry of her appointment.

15. By 24 September 1992 she had exhausted her entitlement under Rule 7.04.1 to totals of nine months' sick leave on full pay and nine on half-pay. By a letter of that date the Director General told her that he was "deferring the final decisions on the questions of your fitness for work and your pay status until I have received a report" from the independent neurologist, Dr. E. Scherzer. Dr. Scherzer having proved unable to act, a neuro-psychiatrist, Dr. Franz Gerstenbrand, was appointed in his stead, and he reported on 8 February 1993.

16. In its report of 16 November 1992 the Joint Appeals Board dealt with the internal appeal of 26 August 1992 as well as with the one of 14 August about her sick leave. Paragraphs 88 and 89 of that report read:

> "88. As to the Kogelmann II appeal of 14 August 1992, the Board recommends reconsideration of Ms. Kogelmann's leave status as of 11 May 1992, the date she requested examination by an independent physician pursuant to Staff Rule 7.04.1(L), and that she be placed on special leave, without pay as of that date.
>
> 89. As there has been no final determination of Ms. Kogelmann's fitness to work, it is premature for the [Board] to make a recommendation as to the Kogelmann III appeal [of 26 August 1992]."

17. In his letter of 22 December 1992 the Director General — having made in the first paragraph the decision impugned in the first complaint — went on to say:

> "As regards the recommendation in para. 88 which relates to your Appeal of 14 August 1992 concerning the decision regarding your fitness for work and pay status, I have decided not to follow the recommendation of the Joint Appeals Board and to maintain my earlier decision communicated to you on 16 July 1992. It is pertinent to point out that had you been placed on special leave without pay, your [United Nations Joint Staff Pension Fund] and health insurance schemes would have been adversely affected.

> As soon as I receive the advice of Dr. Gerstenbrand, I will decide whether my previous decision should be upheld or whether your sick-leave status should be reinstated."

The former of those paragraphs of the letter contains the decision that the complainant is impugning in her second complaint, and the latter the one that she is challenging in her third.

18. Her fourth case is about her entitlement to benefits under the Agency's Temporary Disability Insurance Plan (TDIP): see Judgment 1373 under A and E. By a letter dated 9 November 1992 to her counsel the Director of Personnel explained that the Agency was withholding payment of those benefits pending determination of her sick leave status and her fitness to work and that payments of such benefits as "may be due to a staff member are calculated and paid by the Agency; they are then reclaimed from the insurers at the year end".

19. By a letter of 27 November the complainant asked the Director General to review the Director's decision. A letter of 29 December from the acting Director General referred her to the Director General's letter of 22 December "on the various issues considered by the [Appeals] Board". The complainant filed yet another appeal with the Board on 28 January 1993.

20. The independent neuro-psychiatrist, Dr. Gerstenbrand, reported on 8 February 1993. He concluded that from a neuro-psychiatric point of view she was fit to work. The Director sent her a copy of that report on 8 March 1993. By a letter of 22 March 1993 the Director General told her that in view of that finding, over and above Dr. Kummer's "earlier attestation of your physical fitness", he maintained his previous decision that her sick leave had expired at 17 April 1992 and that she had been fit to report for work on 21 April 1992.

21. The Board reported on 11 May 1993 on her appeal of 28 January 1993. It recommended that she should "be reimbursed for TDIP payments which should properly have been paid to her during the period 11 May 1992 to 22 March 1993, including interest to the extent such was earned by the Agency on funds which otherwise would have been disbursed to her". By a letter of 15 June 1993, as clarified in a letter dated 18 June, the Director General decided not to accept the Board's recommendation, and that is the decision impugned in her fourth complaint.

22. The medical opinions of independent medical practitioners would ordinarily prevail and the Tribunal would not interfere. But this is no ordinary case. For the reasons set out in Judgment 1373 the Tribunal had to appoint a medical expert to give a final opinion on the complainant's medical condition, including her fitness to return to work on the expiry of her sick leave, on 17 April 1992, or thereafter. That expert found that she was not fit to return to work either then or thereafter. That finding must displace the medical opinions that the Agency has relied on to justify its decision that the complainant was fit to return to work. The medical expert's findings cut through all the legal arguments as to whether the decisions were justified at the time or the complainant was entitled to leave nothwithstanding those opinions. Since she was not fit for work, the grounds for the Organisation's decisions on that score were mistaken in fact and must now be rectified.

23. The first and most obvious conclusion is that she is to be reinstated in sick leave status as from 18 April 1992 and any pay entitlements or TDIP benefits flowing from such status that were withheld from her must be paid, together with interest to be reckoned at the rate of 8 per cent a year up to the date of payment. No adjustment for inflation is necessary.

24. Secondly, references in her personal file to her being on unauthorised absence must be deleted.

25. Thirdly, as to her medical expenses, she is entitled to the repayment of any that she incurred for the purpose of showing that she was unfit to return to work, not to any that she incurred for the purpose of showing that her ailments were service-incurred. On that count the Tribunal awards her *ex aequo et bono* the sum of 2,500 Swiss francs.

26. The Tribunal makes her no award for moral damages.

27. It awards her a total of 15,000 Swiss francs towards her costs for her second, third and fourth complaints.

DECISION

For the above reasons

1. The Agency shall pay the complainant the legal costs that she incurred and that were necessitated by the interlocutory order in Judgment 1373, the amount to be approved by the President of the Tribunal failing agreement between the parties.

2. With that sole exception, her first complaint is dismissed.
3. The decisions impugned in her second, third and fourth complaints are set aside.
4. She is reinstated in sick leave status as from 18 April 1992.
5. The Agency shall grant her any pay entitlements and TDIP benefits arising out of her reinstatement in such status, plus interest to be reckoned at the rate of 8 per cent a year from the due dates and up to the date of payment.
6. It shall remove from her personal file any references to unauthorised leave.
7. It shall pay her the sum of 2,500 Swiss francs for the reasons set out in 25 above.
8. It shall pay her a total of 15,000 francs in costs for her second, third and fourth complaints.
9. All her other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

W. Douglas

WILLIAM DOUGLAS

Mella Carroll

MELLA CARROLL

MARK FERNANDO

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-THIRD SESSION

***In re* Berlioz (No. 2), Cussac, Heitz (No. 2), Moyse, Schmitt, and Slater (No. 2)**

Judgment 1641

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Jean-Pierre Berlioz (No. 2), Mrs. Yolaine Cussac, Mrs. Gisèle Heitz (No. 2), Mrs. Ellen Moyse, Mrs. Beate Schmitt and Mrs. Mary Slater (No. 2) against the World Intellectual Property Organization (WIPO) on 22 November 1995 and corrected on 20 February 1996, the observations submitted by the International Civil Service Commission (ICSC) on 19 July 1996, WIPO's single reply of 19 August, the complainants' rejoinder of 2 September, the observations submitted on 16 September by the United Nations, the Commission's comments of 20 November on the complainants' rejoinder, the letter of 29 November from the Registrar of the Tribunal inviting WIPO to submit a surrejoinder, to which the Organization did not reply, and the complainants' comments of 16 December 1996 on the observations of the United Nations;

Considering Article II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Article 13, paragraph 3, of its Rules;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainants belonged at the material time to the General Service category of staff of WIPO, which has its headquarters in Geneva. In accordance with the "Flemming principle", the pay of such staff in the common system of the United Nations is reckoned according to the best conditions of employment at the duty station. To draft pay scales the International Civil Service Commission carries out every five years a survey of local pay. For the purpose it follows what it calls a "general methodology", which it adopts and amends under Article 11(a) of its Statute.

In between surveys the general methodology allows for interim adjustment to the scales to take account of trends in local pay at the duty station. In recommending such adjustment the Commission relies for the most part on the local wages index or the cost-of-living index, or both, and does not itself collect data about local employers. According to paragraph 81(e) and (f) of the methodology, pay is to be so adjusted whenever the relevant index has moved by 5 per cent or more and in any case within 12 months of the last adjustment. Until 1994 adjustments for Geneva depended on shifts in the local index of consumer prices.

As is explained in Judgment 1519 (*in re* Prados and others) under A, the Commission revised the methodology in 1992. The amendment which has led to this case is in paragraph 82 of the new version and reads:

> "Interim adjustments should not take place for a six-month period prior to the reference date of the survey. Any payments due to staff as a result of this postponement would be applicable retroactively if this was justified by the survey results."

On getting their pay slips for January 1995 the complainants found that they did not reflect the increase in the cost of living at Geneva between November 1993 and October 1994.

According to a schedule drawn up by the Commission in 1992 the next salary survey at Geneva was to start in the spring of 1995 and the findings were to be issued some time in the summer. For reasons on which the parties disagree it did not start until June. The Commission approved the findings at its 42nd Session, which it held from 24 July to 11 August 1995. It then recommended that the executive heads of organisations with headquarters in Geneva apply as from 1 June 1995 the new scales based on those findings.

By letters of 27 February 1995 the complainants asked the Director General to review his decision, which he had applied to each of them individually, not to adjust pay as at 1 January 1995. The Director General did not answer. On 18 May they went to the Appeal Board. In its report of 19 July the Board recommended upholding the decision. By a memorandum of 24 August 1995, the decision which each of the complainants is impugning, the Director General told them that he did so.

B. The complainants submit that applying the new so-called "six-month rule" so as to delay alignment of their pay was a breach of Regulation 4.1 of the Staff Regulations which sets out the conditions for recruitment, and of the Flemming principle. The purpose of interim adjustment is to keep pay at WIPO competitive on the local market. Although paragraph 82 of the methodology allows retroactive payment to staff where the findings of a survey so warrant, that is no remedy for the Organization's breach of the rules. Besides, no provision is made for the payment of interest. The six-month rule is inconsistent: retroactive payment, where "justified by the survey results", makes no sense since comparison between the organisations and local employers is based only on conditions at the date taken for the purpose of the survey. The rule is arbitrary because the grounds on which it was introduced are inadequate. It shows abuse of authority.

When seen in the context of the revision of the methodology, the six-month rule appears unlawful: the sole aim of the many amendments was to cut costs at the staff's expense. They run counter to the whole spirit of the methodology, which no longer abides by Flemming. The complainants also plead breach of their right to be consulted.

They have two subsidiary pleas. The first is that the Commission decided on the procedure for interim adjustment unilaterally and in between the 1991 survey and the June 1995 one at Geneva. Though it amended the methodology, it did not expressly make any corrective amendment in that procedure.

Their second plea is that holding over the adjustment is unlawful because the decision setting the reference date of the survey is unlawful. That decision was an abuse of authority in that the Commission took June 1995 as the date so as to make the most of the six-month rule. Furthermore, it rushed through the June 1995 survey in just two months instead of changing its schedule so as to make a proper enquiry.

The complainants contend that the survey carried out in Geneva in 1995 shows formal and procedural flaws. The findings show bias on the part of the Commission and are obviously wrong. For those reasons too, suspending the adjustment was unlawful.

The complainants ask the Tribunal to quash the Director General's decision not to adjust their pay as at 1 January 1995, to order WIPO to recalculate their past and future pay in line with the material rules and to pay the amounts due to them plus interest at the rate of 8 per cent a year. They each seek 5,000 Swiss francs in costs.

C. The Commission rebuts the complainants' pleas. First, it denies that the amendments made in 1992 in the methodology are damaging to the staff's interests. In defence of the six-month rule it explains that interim adjustment would sometimes put pay up to a point that the findings of the next comprehensive survey do not warrant. To apply the new adjustment in such circumstances would increase the gap between the interim scale and the new one, and the new one would have to be correspondingly lowered. Since actually lowering pay is undesirable, it has to be "frozen" at the figure of the last interim adjustment. That in turn means excessive costs for the organisation, which will be paying out more than is due. The complainants are wrong to think that applying Flemming entails automatic interim adjustment. It is the comprehensive surveys that give substance to the principle.

The Commission submits that it had no grounds for not applying the six-month rule from 1992. The reason why the survey was held up until June 1995 was that the staff representatives refused to do what the general methodology required of them. The only difficulty in conducting the survey was to find enough suitable local employers. The staff representatives made things worse by trying to dissuade employers from giving the data. The Commission sees no reason to answer the complainants' other objections to the 1995 survey.

D. In its reply WIPO says that it has nothing to add to the Director General's reply to the complainants' appeal to the Appeal Board and to the Commission's submissions to the Tribunal.

E. In their rejoinder the complainants press their pleas and claims in full. They observe that the Commission is refusing to answer their objections to the Geneva survey and fails to name any local employer that staff representatives deterred from helping with the survey. They challenge the Commission's defence of the six-month rule.

F. The Tribunal having granted the United Nations' application for leave to comment, that Organization states that it shares the Commission's view that the six-month rule was properly established and applied. Freezing pay rather than reducing it when a new survey means lower pay than the interim adjustment warranted requires the Organization to go on paying undue amounts to its staff, to its own financial detriment. It is not the interim adjustments that give body to Flemming but the comprehensive surveys, which are the surest gauge of the best local conditions of employment.

There was nothing wrong with the Geneva survey. Though it came late, that was because staff representatives in Geneva refused to take part and that was a breach of the standards of conduct required of international civil servants. The shortage of local employers taking part was again the fault of those staff representatives, who tried to dissuade some from being helpful.

G. In a further brief the Commission submits that interim adjustment is just an "accessory means" of applying Flemming without making constant comprehensive surveys. The survey could have begun in April or May had the staff representatives done what they ought.

H. In comments on the United Nations' brief the complainants submit that there was no call for it. They say that the rules do not require staff representatives to take part in surveys and that those representatives were not in breach of the standards of conduct required of international civil servants.

CONSIDERATIONS

1. At the material time the complainants were in the General Service category of staff of the World Intellectual Property Organization (WIPO). WIPO belongs to the "common system" of the United Nations that the International Civil Service Commission serves.

The purpose of the Flemming principle is to ensure that the pay of international civil servants matches the best conditions of service at the duty station. To give effect to the principle by adjusting pay general surveys are done from time to time under the Commission's auspices. The procedure for doing such a survey is set out in what is called a "general methodology". The Commission revised the text of it in 1992. The General Assembly of the United Nations adopted the revised methodology in resolution 47/216 of 23 December 1992. In between general surveys interim adjustments may be made in pay: see Judgments 1498 (*in re* Schiffmann and others) and 1499 (*in re* Berger and others). Thus interim adjustments were made in Geneva according to the following criteria:

(a) if, over a twelve-month period, the variation in the consumer price index is less than 5 per cent, salaries are adjusted at the end of the period taking into account the movement in the index and changes in local taxes at Geneva; and

(b) if inflation is over 5 per cent, the adjustment is applied as soon as the 5 per cent threshold is reached.

According to the revised methodology –

(a) there is no interim adjustment in the six months prior to the reference date of the next survey. If justified by the results of the survey, the adjustment is applied retroactively; and

(b) the adjustment due on the basis of the twelve-month rule or the 5 per cent rule is reduced by a factor of 0.1.

There was a general survey done according to the methodology between November 1990 and January 1991 and another in June and July 1995.

In January 1995 WIPO worked out the pay of its General Service staff according to the scales in force at 1 January 1994: in accordance with the revised methodology it did not apply any interim adjustment.

Believing that they were entitled to such adjustment, the complainants lodged a request with the Director General for review of the decision, which was reflected in their pay slips. Having got no answer, they went to the Appeal Board, which recommended rejection. The Director General endorsed the recommendation and that is the decision they are impugning before the Tribunal.

They are challenging the new six-month rule on the grounds that it shows both procedural and substantive flaws. They submit that the application of the rule in January 1995 proved unlawful *ex post facto* in that the inquiry done in June 1995 was invalid, or should be declared so. The starting date for counting the six months retroactively should have been not June 1995 but much later so that the rule did not come into play as from January 1995.

WIPO takes the same stand as in the internal appeal proceedings and asks that the complaints be dismissed.

In briefs which the Tribunal granted them leave to enter the Commission and the United Nations contest the complainants' pleas insofar as the complaints concern them.

The pleadings

2. The Commission was granted such leave as in earlier cases: see Judgments 1457 (*in re* Di Palma and others), 1458 (*in re* Damond and others), 1459 (*in re* Hoebreck and others), 1460 (*in re* Derqué and others), 1603 (*in re* Bensoussan and others), 1604 (*in re* Damond No. 2 and others) and 1605 (*in re* Heitz No. 3). The complainants do not object to that but to the intervention by the United Nations.

Under Article 13, paragraph 3, of the Rules of the Tribunal the President may allow submissions from a third party. Here the President acted under that rule in allowing the United Nations to intervene. The Tribunal sees no grounds for refusing leave to intervene, the aim being to make for uniform application of the rules to the organisations of the United Nations "common system".

Receivability

3. For his complaint to be receivable the staff member must have a cause of action.

Here the complainants do have a cause of action: it is to obtain from the Tribunal a declaration that the rule and the decision they are challenging would still be unlawful even if they had later got the increase that was withheld for the six months prior to the general survey. They would indeed have been slightly better off had they received the increase earlier. They are also entitled to a decision as to whether the rule they are challenging holds good for the future.

4. The complaint is receivable only insofar as it relates to the determination of the complainants' pay for January 1995.

(a) They may not challenge the procedure of the June 1995 survey either on its own merits or on the strength of specific decisions putting the findings into effect. That is because they have failed to exhaust the internal means of redress as Article VII(1) of the Tribunal's Statute requires. The Appeal Board's ruling that the appeal was irreceivable on that score confirms that they did not exhaust their internal remedies.

(b) The complainants comment on the whole exercise of revision. In their view the amendments — which they dwell on at length — and so too the six-month rule were imposed on the staff willy nilly and are largely to their detriment. Since the other amendments have not been challenged either directly or indirectly in the appeal or the complaint, there is no need to go into them here. But if they reflect the current state of the employment market and the financial straits that some organisations are in, the Commission and the Organization may not be held liable on that account.

5. The Tribunal has already explained the rules on how to set staff pay in the organisations of the United Nations "common system" administered by the Commission and its own competence in the matter: see Judgments 1265 (*in re* Berlioz and others), 1266 (*in re* Cussac and others), 1457 to 1460, 1519 (*in re* Prados and others) and 1603 to 1605 and the precedents cited therein.

In challenging an individual decision the staff member may challenge the general decision on which it was based, even if that decision was taken by some other body such as the Commission.

Objections to the revised methodology

6. The complainants submit that there were flaws in the procedure whereby the Commission adopted the six-month rule. After inviting observations from the organisations and staff representatives the Commission "ignored the views of the representatives of administration and staff". Although the staff have no right to co-management of WIPO, they do have a right to be consulted, and that right was disregarded. Citing Judgment 1200 (*in re* Kheir and others) under 2, they assert that that right means –

> "cooperation between staff and management. Though it is not to take the form of bargaining, there must be a real exchange of views, and if it is to work both sides must show good faith."

What is at issue here is a procedure for adopting a rule in which the right to a hearing does not have the same function as in a decision-making process. For one thing, the law-maker does not have to account for the action taken unless there is some express provision to the contrary.

The complainants do not deny that the staff representatives were allowed to enter observations. So the right to a hearing that the Commission's Statute confers on them was observed.

What the complainants are in effect challenging is the rule that the Commission made. So their objections are substantive and the Tribunal will treat them as such.

In any case their procedural objections are too vague for the Tribunal to entertain and must fail.

7. (a) The complainants plead that the six-month rule is in breach of Flemming.

That principle is embodied in Article 4.1 of the WIPO Staff Regulations, which corresponds to Article 101, paragraph 3, of the Charter of the United Nations. Its purpose is to ensure parity of pay between international civil servants in the General Service category and the best-paid local workers in comparable jobs.

The sole material issue is whether the right to such parity is infringed when an interim pay increase required by indexing is held over for the six months preceding a new general survey that is intended to afford an analytical basis for alignment. By indexing is meant adjustment to trends in the cost of living or in local pay.

The first question to be answered is how the difference is to be made up when the general survey indicates that adjustment was warranted when the six-month suspension began. The rule says that "Any payments due ... would be applicable retroactively if this were justified by the survey results". What it does not say is whether the adjustment should depend on the indexing of the interim procedure or on the criteria that a general survey applies. That question would arise if the general survey showed that interim adjustment fell short of the parity required by Flemming. Adjustment must be due by objective criteria which hold good for both sides. So if an organisation does not apply the method of indexing in the six months prior to the survey — which is to its own interest in hard times — it will also have to bear the consequences in full when "flat-rate" adjustment proves insufficient. In that event the amount of the "payments ... applicable retroactively" depends on the findings of the survey. In such instances the new rule works to the staff's benefit. It dispenses with application of the rules on interim adjustment in the six months prior to the general survey.

The staff do not lose any right that they had before if the general survey shows that an increase was due. In that event the Organization must pay them the increase retroactively. Withholding interest scarcely matters because the amounts at stake are tiny and any delay in paying the increase is short. It is a matter within WIPO's discretion: see Judgments 1265 under 26 and 1457 under 18. But when a survey later shows that conditions warranted no increase there is no breach of Flemming.

To judge from the employment market in Europe nowadays, further general surveys may suggest that the parity that Flemming ordains would not bar a fall in General Service category pay in the international civil service. If fall there were, the organisations, though not themselves immune to financial strain, might be loth to cut pay for fear of some later shift warranting an increase, for example a rise in the cost-of-living index. By holding over the latest increase for the last six months WIPO can better keep pace with trends in Geneva. Flemming goes no further than that.

To be sure, the new rule may sometimes favour the staff by preserving their accrued benefits less well than before. But those are not the sort of benefits that Flemming protects: it requires no more than alignment with the best conditions at the duty station.

The principle demands that, so far as can be, pay in the international civil service should stay on a par with the best pay on the local market. Since for the time being there is neither a continuing survey nor a new one interim adjustment answers the purpose of Flemming. Yet, for the reasons stated above, it is not at odds with that purpose to make the adjustment for the last period retroactive in the light of the findings of the general survey. During that period, which is short, the idea of interim adjustment is not discarded but the grant of it simply made subject to other conditions. Suspension might indeed be inadvisable if the period were long, inasmuch as it may mean withholding from someone the higher pay he is entitled to under Flemming for services already rendered. But the six-month rule is a tenable compromise between two requirements of Flemming: interim indexing of pay to the local market and the closest possible match between international and local pay on the strength of general surveys.

(b) The six-month rule is no breach of the staff's acquired rights as defined in the case law: see Judgments 1514 (*in re* Aymon No. 2 and others) under 12, 1515 (*in re* Antoinet No. 3 and others) under 6, 1618 (*in re* Baillet No. 2 and others) under 21 and 22, and the precedents they cite.

(c) The complainants put forward a set of pleas which postulate that the sole purpose of the six-month rule — none other striking them as adequate — must be to help the organisations and harm their staff.

Those pleas are unconvincing. Though an organisation must observe acquired rights and keep binding promises, it has broad discretion to amend its staff regulations either directly or by incorporating the rules of the common system. In the present economic context and if, like many others, it is in financial straits, it may want to cut costs. There is nothing wrong with the common system's having rules that enable it to do so. The complainants have obviously misread the precedent they cite in support of the opposite view: Judgment 990 (*in re* Cuvillier No. 3). Besides, an organisation may have the authority to make savings and yet not use it.

(d) The complainants object to the method of compensation followed when an increase later proves to have been due. They see it as inconsistent and hard to apply.

There is nothing inconsistent about using an index to reckon an interim increase and applying the other criteria that a general survey uses to work out whether an increase is due for the periods following and immediately preceding the survey.

The difficulties of applying the rule are not at all insuperable and may be sorted out as they arise.

8. The complainants contend that the rule had not come into effect when WIPO applied it; that the Commission had entered into a unilateral implied commitment to the staff to keep to the old rule pending the new survey; and that WIPO too should have abided by that commitment.

The evidence does not bear out those contentions. The Commission did say in its report for 1992 (paragraph 232) that the revision would go through at its 37th Session and the current method would be used in the meantime for doing surveys. But in its report on that session (paragraph 80) it said that each organisation would be deciding the date at which the new pay scales were to take effect. It was in that report (paragraph 82) that it introduced the six-month rule. Staff associations too got that report. It was under this rule that the Commission set the date of the survey and hence the dates of the six-month period.

A decision or a rule may not be applied retroactively to the detriment of staff: see Judgment 1589 (*in re* de Assis) and the case law it cites. But here the rule was applied not retroactively but to the interim adjustment for a period following its entry into force.

Although the Commission may for a time have thought of applying the former methodology to the next survey, that did not amount to a binding promise to staff or bar its making and applying the revised one. That there was any specific such promise is not alleged, let alone proved.

Objections to the decision applying the rule

9. (a) If the complainants' method were followed for reckoning the six-month period, the lawfulness of a decision supposed to come into effect at once would depend on the later fulfilment of several conditions. That is plainly not the purpose of the rule. The application of the rule must be lawful at the time when it takes effect. So the start of the six months is the date scheduled as the reference one for the next survey. That is hardly likely to give rise to any difficulties of application.

Here the scheduled date was June 1995; so on that score the impugned decision was in keeping with the prescribed six-month period.

(b) The complainants argue that the choice of June 1995 was arbitrary and calculated solely to cause detriment to the staff; that WIPO therefore had no reason to abide by it; and that the rule did not apply in January 1995.

Periodical surveys are part of the procedure adopted to put Flemming into effect. Setting the date for the survey was therefore not in itself contrary to the Organization's interests and no abuse of authority. Nor was the survey set at a date when it could not be carried out.

The plea fails.

Consequently, on that score too WIPO observed the six-month period, which was to run until the date anticipated for the next survey.

10. The conclusion is that the complaints are devoid of merit.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment Mr. Michel Gentot, Vice-President, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

MICHEL GENTOT E. RAZAFINDRALAMBO EGLI

A.B. GARDNER

Registry's translation,
the French text alone
being authoritative.

EIGHTY-THIRD SESSION

***In re* Huber and Treso** **Judgment 1642**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mrs. Pia Huber and Miss Gabriela Treso against the International Union for the Protection of New Varieties of Plants (UPOV) on 22 November 1995 and corrected on 20 February 1996, the observations submitted by the International Civil Service Commission (ICSC) on 19 July 1996, UPOV's single reply of 19 August, the complainants' rejoinder of 2 September, the observations submitted on 16 September by the United Nations, the Commission's comments of 20 November on the complainants' rejoinder, the letter of 29 November from the Registrar of the Tribunal inviting UPOV to submit a surrejoinder, to which UPOV did not reply, and the complainants' comments of 16 December 1996 on the observations of the United Nations;

Considering Article II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Article 13, paragraph 3, of its Rules;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainants belong to the General Service category of staff of UPOV, which has its headquarters in Geneva. In accordance with the "Flemming principle", the pay of such staff in the common system of the United Nations is reckoned according to the best conditions of employment at the duty station. To draft pay scales the International Civil Service Commission carries out every five years a survey of local pay. For the purpose it follows what it calls a "general methodology", which it adopts and amends under Article 11(a) of its Statute.

In between surveys the general methodology allows for interim adjustment to the scales to take account of trends in local pay at the duty station. In recommending such adjustment the Commission relies for the most part on the local wages index or the cost-of-living index, or both, and does not itself collect data about local employers. According to paragraph 81(e) and (f) of the methodology, pay is to be so adjusted whenever the relevant index has moved by 5 per cent or more and in any case within 12 months of the last adjustment. Until 1994 adjustments for Geneva depended on shifts in the local index of consumer prices.

As is explained in Judgment 1519 (*in re* Prados and others) under A, the Commission revised the methodology in 1992. The amendment which has led to this case is in paragraph 82 of the new version and reads:

> "Interim adjustments should not take place for a six-month period prior to the reference date of the survey. Any payments due to staff as a result of this postponement would be applicable retroactively if this was justified by the survey results."

On getting their pay slips for January 1995 the complainants found that they did not reflect the increase in the cost of living at Geneva between November 1993 and October 1994.

According to a schedule drawn up by the Commission in 1992 the next salary survey at Geneva was to start in the spring of 1995 and the findings were to be issued some time in the summer. For reasons on which the parties disagree it did not start until June. The Commission approved the findings at its 42nd Session, which it held from 24 July to 11 August 1995. It then recommended that the executive heads of organisations with headquarters in Geneva apply as from 1 June 1995 the new scales based on those findings.

By letters of 27 February 1995 the complainants asked the Secretary-General of the Union to review his decision, which he had applied to each of them individually, not to adjust pay as at 1 January 1995. The Secretary-General did not answer. On 18 May they went to the Appeal Board of the World Intellectual Property Organisation, which hears cases from the staff of UPOV as well. In its report of 19 July the Board recommended upholding the decision. By a memorandum of 24 August 1995, the decision which both complainants are impugning, the Secretary-General told them that he did so.

B. The complainants submit that applying the new so-called "six-month rule" so as to delay alignment of their pay was a breach of Regulation 4.1

of the WIPO Staff Regulations (also applicable to the staff of UPOV) which sets out the conditions for recruitment, and of the Flemming principle. The purpose of interim adjustment is to keep pay at UPOV competitive on the local market. Although paragraph 82 of the methodology allows retroactive payment to staff where the findings of a survey so warrant, that is no remedy for the Union's breach of the rules. Besides, no provision is made for the payment of interest. The six-month rule is inconsistent: retroactive payment, where "justified by the survey results", makes no sense since comparison between the organisations and local employers is based only on conditions at the date taken for the purpose of the survey. The rule is arbitrary because the grounds on which it was introduced are inadequate. It shows abuse of authority.

When seen in the context of the revision of the methodology, the six-month rule appears unlawful: the sole aim of the many amendments was to cut costs at the staff's expense. They run counter to the whole spirit of the methodology, which no longer abides by Flemming. The complainants also plead breach of their right to be consulted.

They have two subsidiary pleas. The first is that the Commission decided on the procedure for interim adjustment unilaterally and in between the 1991 survey and the June 1995 one at Geneva. Though it amended the methodology, it did not expressly make any corrective amendment in that procedure.

Their second plea is that holding over the adjustment is unlawful because the decision setting the reference date of the survey is unlawful. That decision was an abuse of authority in that the Commission took June 1995 as the date so as to make the most of the six-month rule. Furthermore, it rushed through the June 1995 survey in just two months instead of changing its schedule so as to make a proper enquiry.

The complainants contend that the survey carried out in Geneva in 1995 shows formal and procedural flaws. The findings show bias on the part of the Commission and are obviously wrong. For those reasons too, suspending the adjustment was unlawful.

The complainants ask the Tribunal to quash the Secretary-General's decision not to adjust their pay as at 1 January 1995, to order the Union to recalculate their past and future pay in line with the material rules and to pay the amounts due to them plus interest at the rate of 8 per cent a year. They each seek 5,000 Swiss francs in costs.

C. The Commission rebuts the complainants' pleas. First, it denies that the amendments made in 1992 in the methodology are damaging to the staff's interests. In defence of the six-month rule it explains that interim adjustment would sometimes put pay up to a point that the findings of the next comprehensive survey do not warrant. To apply the new adjustment in such circumstances would increase the gap between the interim scale and the new one, and the new one would have to be correspondingly lowered. Since actually lowering pay is undesirable, it has to be "frozen" at the figure of the last interim adjustment. That in turn means excessive costs for the organisation, which will be paying out more than is due. The complainants are wrong to think that applying Flemming entails automatic interim adjustment. It is the comprehensive surveys that give substance to the principle.

The Commission submits that it had no grounds for not applying the six-month rule from 1992. The reason why the survey was held up until June 1995 was that the staff representatives refused to do what the general methodology required of them. The only difficulty in conducting the survey was to find enough suitable local employers. The staff representatives made things worse by trying to dissuade employers from giving the data. The Commission sees no reason to answer the complainants' other objections to the 1995 survey.

D. In its reply UPOV says that it has nothing to add to the Secretary-General's reply to the complainants' appeal to the WIPO Appeal Board and to the Commission's submissions to the Tribunal.

E. In their rejoinder the complainants press their pleas and claims in full. They observe that the Commission is refusing to answer their objections to the Geneva survey and fails to name any local employer that staff representatives deterred from helping with the survey. They challenge the Commission's defence of the six-month rule.

F. The Tribunal having granted the United Nations' application for leave to comment, that Organization states that it shares the Commission's view that the six-month rule was properly established and applied. Freezing pay rather than reducing it when a new survey means lower pay than the interim adjustment warranted requires the organisation to go on paying undue amounts to its staff, to its own financial detriment. It is not the interim adjustments that give body to Flemming but the comprehensive surveys, which are the surest gauge of the best local conditions of employment.

There was nothing wrong with the Geneva survey. Though it came late, that was because staff representatives in Geneva refused to take part and that was a breach of the standards of conduct required of international civil servants. The shortage of local employers taking part was again the fault of those staff representatives, who tried to dissuade some from being helpful.

G. In a further brief the Commission submits that interim adjustment is just an "accessory means" of applying Flemming without making constant comprehensive surveys. The survey could have begun in April or May had the staff representatives done what they ought.

H. In comments on the United Nations' brief the complainants submit that there was no call for it. They say that the rules do not require staff representatives to take part in surveys and that those representatives were not in breach of the standards of conduct required of international civil servants.

CONSIDERATIONS

1. The complainants are in the General Service category of staff of UPOV. The Union belongs to the "common system" of the United Nations that the International Civil Service Commission serves. The Staff Rules and Regulations of the WIPO apply to the Union's staff too.

The purpose of the Flemming principle is to ensure that the pay of international civil servants matches the best conditions of service at the duty station. To give effect to the principle by adjusting pay general surveys are done from time to time under the Commission's auspices. The procedure for doing such a survey is set out in what is called a "general methodology". The Commission revised the text of it in 1992. The General Assembly of the United Nations adopted the revised methodology in resolution 47/216 of 23 December 1992. In between general surveys interim adjustments may be made in pay: see Judgments 1498 (*in re* Schiffmann and others) and 1499 (*in re* Berger and others). Thus interim adjustments were made in Geneva according to the following criteria:

(a) if, over a twelve-month period, the variation in the consumer price index is less than 5 per cent, salaries are adjusted at the end of the period taking into account the movement in the index and changes in local taxes at Geneva; and

(b) if inflation is over 5 per cent, the adjustment is applied as soon as the 5 per cent threshold is reached.

According to the revised methodology -

(a) there is no interim adjustment in the six months prior to the reference date of the next survey. If justified by the results of the survey, the adjustment is applied retroactively; and

(b) the adjustment due on the basis of the twelve-month rule or the 5 per cent rule is reduced by a factor of 0.1.

There was a general survey done according to the methodology between November 1990 and January 1991 and another in June and July 1995.

In January 1995 UPOV worked out the pay of its General Service staff according to the scales in force at 1 January 1994: in accordance with the revised methodology it did not apply any interim adjustment.

Believing that they were entitled to such adjustment, the complainants lodged a request with the Secretary-General for review of the decision, which was reflected in their pay slips. Having got no answer, they went to the Appeal Board of WIPO, which recommended rejection. The Secretary-General endorsed the recommendation and that is the decision they are impugning before the Tribunal.

They are challenging the new six-month rule on the grounds that it shows both procedural and substantive flaws. They submit that the application of the rule in January 1995 proved unlawful *ex post facto* in that the inquiry done in June 1995 was invalid, or should be declared so. The starting date for counting the six months retroactively should have been not June 1995 but much later so that the rule did not come into play as from January 1995.

The Union takes the same stand as in the internal appeal proceedings and asks that the complaints be dismissed.

In briefs which the Tribunal granted them leave to enter the Commission and the United Nations contest the complainants' pleas insofar as the complaints concern them.

The pleadings

2. The Commission was granted such leave as in earlier cases: see Judgments 1457 (*in re* Di Palma and others), 1458 (*in re* Damond and others), 1459 (*in re* Hoebreck and others), 1460 (*in re* Derqué and others),

1603 (*in re* Bensoussan and others), 1604 (*in re* Damond No. 2 and others) and 1605 (*in re* Heitz No. 3). The complainants do not object to that but to the intervention by the United Nations.

Under Article 13, paragraph 3, of the Rules of the Tribunal the President may allow submissions from a third party. Here the President acted under that rule in allowing the United Nations to intervene. The Tribunal sees no grounds for refusing leave to intervene, the aim being to make for uniform application of the rules to the organisations of the United Nations "common system".

Receivability

3. For his complaint to be receivable the staff member must have a cause of action.

Here the complainants do have a cause of action: it is to obtain from the Tribunal a declaration that the rule and the decision they are challenging would still be unlawful even if they had later got the increase that was withheld for the six months prior to the general survey. They would indeed have been slightly better off had they received the increase earlier. They are also entitled to a decision as to whether the rule they are challenging holds good for the future.

4. The complaint is receivable only insofar as it relates to the determination of the complainants' pay for January 1995.

(a) They may not challenge the procedure of the June 1995 survey either on its own merits or on the strength of specific decisions putting the findings into effect. That is because they have failed to exhaust the internal means of redress as Article VII(1) of the Tribunal's Statute requires. The Appeal Board's ruling that the appeal was irreceivable on that score confirms that they did not exhaust their internal remedies.

(b) The complainants comment on the whole exercise of revision. In their view the amendments — which they dwell on at length — and so too the six-month rule were imposed on the staff willy nilly and are largely to their detriment.

Since the other amendments have not been challenged either directly or indirectly in the appeal or the complaint, there is no need to go into them here. But if they reflect the current state of the employment market and the financial straits that some organisations are in, the Commission and the Union may not be held liable on that account.

5. The Tribunal has already explained the rules on how to set staff pay in the organisations of the United Nations "common system" administered by the Commission and its own competence in the matter: see Judgments 1265 (*in re* Berlioz and others), 1266 (*in re* Cussac and others), 1457 to 1460, 1519 (*in re* Prados and others) and 1603 to 1605 and the precedents cited therein.

In challenging an individual decision the staff member may challenge the general decision on which it was based, even if that decision was taken by some other body such as the Commission.

Objections to the revised methodology

6. The complainants submit that there were flaws in the procedure whereby the Commission adopted the six-month rule. After inviting observations from the organisations and staff representatives the Commission "ignored the views of the representatives of administration and staff". Although the staff have no right to co-management of the Union, they do have a right to be consulted, and that right was disregarded. Citing Judgment 1200 (*in re* Kheir and others) under 2, they assert that that right means –

> "cooperation between staff and management. Though it is not to take the form of bargaining, there must be a real exchange of views, and if it is to work both sides must show good faith."

What is at issue here is a procedure for adopting a rule in which the right to a hearing does not have the same function as in a decision-making process. For one thing, the law-maker does not have to account for the action taken unless there is some express provision to the contrary.

The complainants do not deny that the staff representatives were allowed to enter observations. So the right to a hearing that the Commission's Statutes confers on them was observed.

What the complainants are in effect challenging is the rule that the Commission made. So their objections are substantive and the Tribunal will treat them as such.

In any case their procedural objections are too vague for the Tribunal to entertain and must fail.

7. (a) The complainants plead that the six-month rule is in breach of Flemming.

That principle is embodied in Article 4.1 of the WIPO Staff Regulations, which corresponds to Article 101, paragraph 3, of the Charter of the United Nations. Its purpose is to ensure parity of pay between international civil servants in the General Service category and the best-paid local workers in comparable jobs.

The sole material issue is whether the right to such parity is infringed when an interim pay increase required by indexing is held over for the six months preceding a new general survey that is intended to afford an analytical basis for alignment. By indexing is meant adjustment to trends in the cost of living or in local pay.

The first question to be answered is how the difference is to be made up when the general survey indicates that adjustment was warranted when the six-month suspension began. The rule says that "Any payments due ... would be applicable retroactively if this were justified by the survey results". What it does not say is whether the adjustment should depend on the indexing of the interim procedure or on the criteria that a general survey applies. That question would arise if the general survey showed that interim adjustment fell short of the parity required by Flemming. Adjustment must be due by objective criteria which hold good for both sides. So if an organisation does not apply the method of indexing in the six months prior to the survey — which is to its own interest in hard times — it will also have to bear the consequences in full when "flat-rate" adjustment proves insufficient. In that event the amount of the "payments ... applicable retroactively" depends on the findings of the survey. In such instances the new rule works to the staff's benefit. It dispenses with application of the rules on interim adjustment in the six months prior to the general survey.

The staff do not lose any right that they had before if the general survey shows that an increase was due. In that event the Union must pay them the increase retroactively. Withholding interest scarcely matters because the amounts at stake are tiny and any delay in paying the increase is short. It is a matter within the Union's discretion: see Judgments 1265 under 26 and 1457 under 18. But when a survey later shows that conditions warranted no increase there is no breach of Flemming.

To judge from the employment market in Europe nowadays, further general surveys may suggest that the parity that Flemming ordains would not bar a fall in General Service category pay in the international civil service. If fall there were, the organisations, though not themselves immune to financial strain, might be loth to cut pay for fear of some later shift warranting an increase, for example a rise in the cost-of-living index. By holding over the latest increase for the last six months the Union can better keep pace with trends in Geneva. Flemming goes no further than that.

To be sure, the new rule may sometimes favour the staff by preserving their accrued benefits less well than before. But those are not the sort of benefits that Flemming protects: it requires no more than alignment with the best conditions at the duty station.

The principle demands that, so far as can be, pay in the international civil service should stay on a par with the best pay on the local market. Since for the time being there is neither a continuing survey nor a new one interim adjustment answers the purpose of Flemming. Yet, for the reasons stated above, it is not at odds with that purpose to make the adjustment for the last period retroactive in the light of the findings of the general survey. During that period, which is short, the idea of interim adjustment is not discarded but the grant of it simply made subject to other conditions. Suspension might indeed be inadvisable if the period were long, inasmuch as it may mean withholding from someone the higher pay he is entitled to under Flemming for services already rendered. But the six-month rule is a tenable compromise between two requirements of Flemming: interim indexing of pay to the local market and the closest possible match between international and local pay on the strength of general surveys.

(b) The six-month rule is no breach of the staff's acquired rights as defined in the case law: see Judgments 1514 (*in re* Aymon No. 2 and others) under 12, 1515 (*in re* Antoinet No. 3 and others) under 6, 1618 (*in re* Baillet No. 2 and others) under 21 and 22, and the precedents they cite.

(c) The complainants put forward a set of pleas which postulate that the sole purpose of the six-month rule — none other striking them as adequate — must be to help the organisations and harm their staff.

Those pleas are unconvincing. Though an organisation must observe acquired rights and keep binding promises, it has broad discretion to amend its staff regulations either directly or by incorporating the rules of the common system. In the present economic context and if, like many others, it is in financial straits, it may want to cut costs. There is nothing wrong with the common system's having rules that enable it to do so. The complainants have obviously misread the precedent they cite in support of the opposite view: Judgment 990 (*in re* Cuvillier No. 3). Besides, an organisation may have the authority to make savings and yet not use it.

(d) The complainants object to the method of compensation followed when an increase later proves to have been due. They see it as inconsistent and hard to apply.

There is nothing inconsistent about using an index to reckon an interim increase and applying the other criteria that a general survey uses to work out whether an increase is due for the periods following and immediately preceding the survey.

The difficulties of applying the rule are not at all insuperable and may be sorted out as they arise.

8. The complainants contend that the rule had not come into effect when the Union applied it; that the Commission had entered into a unilateral implied commitment to the staff to keep to the old rule pending the new survey; and that the Union too should have abided by that commitment.

The evidence does not bear out those contentions. The Commission did say in its report for 1992 (paragraph 232) that the revision would go through at its 37th Session and the current method would be used in the meantime for doing surveys. But in its report on that session (paragraph 80) it said that each organisation would be deciding the date at which the new pay scales were to take effect. It was in that report (paragraph 82) that it introduced the six-month rule. Staff associations too got that report. It was under this rule that the Commission set the date of the survey and hence the dates of the six-month period.

A decision or a rule may not be applied retroactively to the detriment of staff: see Judgment 1589 (*in re* de Assis) and the case law it cites. But here the rule was applied not retroactively but to the interim adjustment for a period following its entry into force.

Although the Commission may for a time have thought of applying the former methodology to the next survey, that did not amount to a binding promise to staff or bar its making and applying the revised one. That there was any specific such promise is not alleged, let alone proved.

Objections to the decision applying the rule

9. (a) If the complainants' method were followed for reckoning the six-month period, the lawfulness of a decision supposed to come into effect at once would depend on the later fulfilment of several conditions. That is plainly not the purpose of the rule. The application of the rule must be lawful at the time when it takes effect. So the start of the six months is the date scheduled as the reference one for the next survey. That is hardly likely to give rise to any difficulties of application.

Here the scheduled date was June 1995; so on that score the impugned decision was in keeping with the prescribed six-month period.

(b) The complainants argue that the choice of June 1995 was arbitrary and calculated solely to cause detriment to the staff; that the Union therefore had no reason to abide by it; and that the rule did not apply in January 1995.

Periodical surveys are part of the procedure adopted to put Flemming into effect. Setting the date for the survey was therefore not in itself contrary to the organisation's interests and no abuse of authority. Nor was the survey set at a date when it could not be carried out.

The plea fails.

Consequently, on that score too the Union observed the six-month period, which was to run until the date anticipated for the next survey.

10. The conclusion is that the complaints are devoid of merit.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment Mr. Michel Gentot, Vice-President, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

MICHEL GENTOT E. RAZAFINDRALAMBO EGLI

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation, the French text alone being authoritative.

EIGHTY-THIRD SESSION

***In re* Milicua de Rabino** **Judgment 1643**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Dalila Milicua de Rabino against the Universal Postal Union (UPU) on 23 August 1996, the UPU's reply of 27 September, the complainant's rejoinder of 1 November and the Union's surrejoinder of 10 December 1996 as supplemented on 25 March 1997;

Considering Articles II, paragraphs 5 and 7, and VII, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Uruguayan, used to serve in Montevideo as a translator in the Spanish Translation Service (STES) in the General Secretariat of the Postal Union of the Americas, Spain and Portugal (UPAEP). That service was run by the Spanish Language Group (GLES) of UPU. The STES in Montevideo used to send a translator to the UPU in Bern to do urgent translation work. The Director-General of the International Bureau of the Universal Postal Union is the agent of the Spanish Language Group of the Union. Acting in that capacity and by a letter of 6 October 1992, he appointed her to the STES in Bern. He did so in accordance with a system of rotation that had been in force for some years. She got an appointment as a translator at grade P.4 from 1 January 1993 to 31 December 1996. For financial reasons, and mistakenly believing that her contract was to expire at 31 December 1995, the GLES decided to send her back to Montevideo thereafter and to suspend the work of the STES in Bern. By a letter of 17 November 1995 she agreed "to return, as from 1 January 1996, to [her] permanent post as a translator at grade P.2, step 12, with the General Secretariat of the UPAEP".

By a "resolution" of 1 April 1996 the Secretary-General of the UPAEP told her that her appointment would end at 8 April 1996. On 26 April she made an appeal against that decision to the Director-General of the International Bureau of the UPU, who said on 13 May 1996 that he did not wish to "meddle in matters outside [his] own competence". By a letter of 28 May she appealed to the Joint Appeals Committee of the UPU, but in its report of 7 June the Committee held that it was not competent to hear her case. The Director-General sent her the report under cover of a letter of 10 June 1996 in which he endorsed the Committee's conclusions. She filed another appeal with the Uruguayan Postal Administration, the supreme supervisory body of the UPAEP's General Secretariat, but that too was rejected on 1 July 1996. And an appeal she put to the UPAEP's Consultative and Executive Council was dismissed in March 1997. She is impugning the Director-General's decision of 10 June 1996.

B. The complainant submits that, though smaller postal unions like the UPAEP have legal personality, they are the offspring of the UPU. So, according to the general principles of law, they must abide by the administrative rules of the UPU. Since her complaint is about the validity of her contract with the UPU, the Tribunal is competent to entertain it.

When she left Bern she was given promises of reinstatement in her post in Montevideo. But they were not kept: though immediately reinstated in the STES in Montevideo, she was dismissed three months later. She contends that the decision to end her appointment in Bern was flawed because she did not consent and so her contract with the UPU holds good.

She asks the Tribunal to quash the termination of her appointment with the UPU in Bern and to reinstate her in the same post; to set aside the "resolution" of 1 April 1996 giving her notice of dismissal and to order her reinstatement also in her permanent post as translator with the STES in Montevideo. She seeks awards of damages and costs.

C. In its reply the UPU submits that her claims concerning her contract with the STES in Montevideo, a service of the UPAEP run by the GLES and independent of the UPU, are irreceivable because the Tribunal is not competent to hear them. Her claims to the quashing of the termination of her appointment with the UPU and to reinstatement are new and therefore irreceivable because she has failed to exhaust internal means of redress.

In subsidiary argument the UPU denies that it acted without her consent: she knew what she was about when she agreed to the shortening of her contract. It fulfilled the condition on which, she says, her return to the STES in Montevideo depended. What happened afterwards does not invalidate her consent.

D. In her rejoinder the complainant denies that the STES is independent of the UPU. In her submission the means of redress afforded by the UPAEP do not guarantee impartiality since she may appeal only to the very body that approved her dismissal. She maintains that lack of consent has been established, since the original decision, which the GLES took on the strength of wrong information, is unlawful. She agreed to go back to Montevideo a year early out of a sense of loyalty and to help the STES when it was in financial straits. But the UPAEP showed bad faith and broke its promises of reinstatement in Montevideo by terminating her appointment three months later. The complainant presses her claims. She seeks an award of at least 50,000 Swiss francs in damages and terminal entitlements for the three periods of her secondments to Bern and for all the years she served in Montevideo.

E. In its surrejoinder the UPU maintains that it has no legal ties with the staff of the STES and did not ask the UPAEP to guarantee stable jobs for translators on secondment to Bern. It objects to the complainant's making new claims in her rejoinder. It adds that her last contract in Bern was shortened by mutual consent and that it did not dismiss her since her appointment at the GLES was maintained. As to her separation from the STES in Montevideo the UPAEP has already granted her terminal entitlements.

CONSIDERATIONS

1. The complainant, a Spanish translator with the General Secretariat of the Postal Union of the Americas, Spain and Portugal (UPAEP), was assigned by a letter of 6 October 1992 for the period from 1 January 1993 to 31 December 1996 to the Spanish Translation Service (STES) with the International Bureau of the Universal Postal Union (UPU) in Bern. The letter was signed by the Director-General of the International Bureau in his capacity as agent of the Spanish Language Group (GLES) of the Union. It said that she would enjoy "conditions of service similar to those of staff members of the International Bureau, the relevant provisions of the Staff Rules and Regulations of the International Bureau of the UPU applying by

analogy". At the request of the GLES it was decided that the secondment of another translator to the International Bureau at Bern would be suspended. The complainant having given her consent on 17 November 1995, the Director-General of the International Bureau told her on 12 December 1995 that her employment with the STES in Bern would end on 31 December 1995 instead of 31 December 1996. She thereupon went back to her post at the UPAEP but three months later, on 1 April 1996, was given notice of termination of her appointment.

2. She has filed appeals with several bodies, to no avail. She is now asking the Tribunal to set aside a decision of 10 June 1996 by the Director-General of the International Bureau of the UPU endorsing the conclusion of its Joint Appeals Committee that, having gone back to her post in Montevideo, she was no longer covered by the UPU Staff Regulations and the Union was not competent to entertain her appeal.

3. She is also asking the Tribunal to quash the termination of her contract of 6 October 1992 with the UPU, to order the Union to reinstate her in the post she held before the termination, to quash the decision terminating her appointment as a translator in Montevideo and to order her reinstatement in that post as well.

4. The complaint raises the issue of the Tribunal's competence, and on that score the Tribunal refers to Judgment 1644, also delivered this day on the complaint of Mrs. Marina Rubio. As a staff member of the STES in Montevideo she comes under the sole authority of the UPAEP, an international organisation that has not recognised the Tribunal's jurisdiction. So the Tribunal may not entertain her claim to the quashing of the decision of 1 April 1996 by the Secretary-General of the UPAEP terminating her appointment.

5. The Tribunal will, however, entertain her complaint insofar as she is challenging the decision by the Director-General of the International Bureau to curtail her appointment with the STES in Bern. The UPU submits that that claim is irreceivable, but it is in any event devoid of merit. She argues that the purportedly agreed termination of her contract with her agreement was flawed for lack of her own consent. It is true that, as she says, the original decision by the GLES to seek suspension of the work of the Spanish Translation Service in Bern as from 1 January 1996 was based on a mistake about the date of expiry of her contract. The Secretary-General of the UPAEP, who is the "spokesman" of the GLES, acknowledged the mistake in a letter of 6 November 1995 in which he admitted that "the

unilateral decision to send the translator back to Montevideo at the end of 1995 was contrary to the terms of the contract". As is plain, however, from her letter of 17 November 1995 to the Secretary-General of the UPAEP, she was aware of the mistake and so she knew full well what she was doing when she agreed "to return, as from 1 January 1996, to [her] permanent post as a translator at grade P.2, step 12, with the General Secretariat of the UPAEP". So she may not plead lack of consent. It is true again that, as the Joint Appeals Committee pointed out, the Director-General consented to her early departure "provided that she is reinstated in the STES of the UPAEP in Montevideo as from the day after her termination in Bern". And it is obvious that neither the UPU nor she expected her to be dismissed three months later. But, as was said above, the decision to dismiss her was not taken by the UPU and does not fall within the Tribunal's competence. There being no need to rule on the receivability of her claims under this head, the Tribunal holds that the decision to end her secondment to Bern was taken with her consent and so in any case may not be set aside.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

WILLIAM DOUGLAS MICHEL GENTOT JULIO BARBERIS

A.B. GARDNER

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-THIRD SESSION

In re Rubio

Judgment 1644

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Marina Rubio against the Universal Postal Union (UPU) on 10 September 1996 and corrected on 14 November 1996, the UPU's reply of 16 January 1997, the complainant's rejoinder of 24 February and the Union's surrejoinder of 24 March as supplemented on 25 March 1997;

Considering Articles II, paragraphs 5 and 7, and VII, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who is Uruguayan, served as a translator in the Spanish Translation Service (STES) in the General Secretariat of the Postal Union of the Americas, Spain and Portugal (UPAEP) in Montevideo. That service was run by the Spanish Language Group (GLES) of the UPU. The STES in Montevideo used to send a translator to the UPU in Bern to do urgent translation work. Under a system of rotation introduced a few years earlier the complainant was twice seconded to the STES in Bern. Her last assignment in Bern ended at 31 December 1992, whereupon she returned to her post in Montevideo.

By a "resolution" of 1 April 1996 notified to her on 3 April the Secretary-General of the UPAEP, who is also the "spokesman" of the GLES, told the complainant that her appointment was to end on 8 April 1996. On 29 April she lodged a "complaint" against the decision with the Director-General of the International Bureau of the UPU. The Director-

General replied on 8 May 1996 that he was not "free to interfere in internal matters of the UPAEP". By a letter of 31 May she lodged an appeal with the Joint Appeals Committee of the UPU. In its report of 7 June 1996 the Committee held that it was not competent to hear the appeal. The Director-General sent the report to the complainant on 10 June 1996, saying that he endorsed its conclusions. That is the decision she is now impugning. An appeal she filed with the Consultative and Executive Council of the UPAEP was rejected in March 1997.

B. The complainant observes that since the GLES and the UPAEP have no independent appeal bodies there is no due process. Citing Judgments 122 (*in re* Chadsey) and 1013 (*in re* Zayed Nos. 4 and 5), she submits that the Tribunal may entertain a dispute between a language group such as the GLES and its employee.

She refutes all the arguments put forward by the spokesman of the GLES to justify her dismissal and submits that none of the grounds for termination set out in Article 25 of UPAEP's Staff Regulations applies to her. The resolution of 1 April 1996 is therefore "unlawful, unwarranted and invalid". She pleads discrimination on the grounds that from 1990 onwards she had a tithe of her pay docked as her own contribution to the UPAEP's Pension Fund instead of the usual twentieth that was being subtracted from the pay of other staff.

In her submission the impugned decision offends against general principles of law, international law and the UPAEP's own rules and amounts to misuse of authority. She has suffered a "breach of human rights" in that the UPAEP's failure to compensate her for its unlawful action and to give her a properly detailed certificate of service that would help her to find another job. The impugned decision has caused her serious moral and financial injury.

She seeks the quashing of the decision to dismiss her and reinstatement in her post or, failing that, an "amount equal to at least the pay that would have accrued to [her] up to the age of retirement (65) without prejudice to any damages to which [she] may claim in due course". She seeks material and moral damages for loss of employment, costs and repayment of her "overpayments to the Savings Plan Fund, plus interest, and damages for what [she] had to undergo in Bern from 1989 to 1991". She asks for the correction of mistakes in the tally of her contributions to the Savings Plan.

She reserves the right to appeal to "other competent bodies" and to do whatever she must to obtain damages.

C. In its reply the defendant explains that the smaller Unions are not part of the UPU but legally autonomous. So is the STES, which the UPAEP set up and the GLES administers, and whose staff are not employees of the UPU. So to the UPU the General Secretariat of the UPAEP is a "sub-contractor". The judgments cited by the complainant confirm that the Tribunal may hear complaints from STES staff in Bern but not in Montevideo, where she was at the material time. Her complaint is irreceivable, mainly because the UPAEP has not recognised the Tribunal's jurisdiction and subsidiarily because she has not exhausted the internal means of redress: the Consultative and Executive Council of the UPAEP would not be hearing her appeal until March 1997.

D. The complainant rejoins that the impugned decision is a final one within the meaning of Article VII of the Tribunal's Statute. She points out that she had a permanent appointment with the UPAEP and that her status was governed by the Staff Regulations and not by contract. Since the UPAEP Congress neither dismissed her nor abolished any post, and since there is no evidence of any delegation of authority, her dismissal is unlawful and invalid. The decision was unsubstantiated, she was given no notice and the Joint Advisory Committee was not consulted. She believes that she may appeal to the Government of Uruguay, which is not only the host country of the GLES but her own. She presses her pleas.

E. The Union draws a distinction between STES staff in Bern and those in Montevideo. The STES works not for the UPU but for the GLES, which is free to farm out translations to anyone it likes. The complainant's filing of appeals with the UPAEP and with the Government of Uruguay acknowledges that she is not covered by the Staff Regulations of the International Bureau and that the Tribunal is not competent to hear her case.

CONSIDERATIONS

1. The complainant was a Spanish translator with the General Secretariat of the Postal Union of the Americas, Spain and Portugal (UPAEP), which has its headquarters in Montevideo. She was dismissed by a decision that its Secretary-General took on 1 April 1996. She has appealed to the UPAEP itself, to several Uruguayan bodies and to the Director-

General of the International Bureau of the Universal Postal Union in his capacity as "agent" of the Spanish Language Group (GLES). The Director-General rejected her appeal on 8 May 1996 on the grounds that he had no authority to interfere in internal matters of the UPAEP. She thereupon appealed to the Joint Appeals Committee of the UPU. In its report of 7 June 1996 that Committee held that it was not competent to entertain the appeal. It said:

> "(a) On the basis of individual agreements, staff members of the translation services who are employed by the language groups established within the UPU, are granted, for the duration of their term at the International Bureau, working conditions similar to those of staff members of the Bureau. In such cases certain provisions of the Staff Regulations apply to them by analogy and the Director-General then acts as agent of the language group concerned.
>
> (b) The appellant's last secondment to Bern having ended on 31 December 1992, the Director-General of the International Bureau ceased to act as agent from that date."

The Director-General told the complainant on 10 June 1996 that he endorsed the Committee's conclusion.

2. She pleads that that decision was unlawful and that the dismissal she had thus unsuccessfully appealed against to the Director-General should be set aside. She submits that the GLES, to which she belongs, was set up under UPU rules, and so it is the agent of the GLES — the Director-General — who may review decisions about GLES staff. Several judgments — she observes — have declared the Director-General and the Tribunal to be competent in such cases, and ignoring precedent would deprive the staff of their right to due process.

3. What, then, are all these institutions? On the answer will turn the Tribunal's ruling on the complaint.

4. The Universal Postal Union has its headquarters in Bern. It is an international organisation which has recognised the Tribunal's competence under Article II, paragraph 5, of its Statute to entertain complaints concerning the staff of the Union.

5. The Postal Union of the Americas, Spain and Portugal is a smaller organisation set up under Article 8 of the UPU's Constitution. It has legal personality and autonomy and its own terms of reference.

6. Language groups are set up within the UPU under Article 107.2 of its General Regulations, by "the member ... countries which have

requested a language other" than French, the official one. They are autonomous and, as prescribed by the General Regulations, ordinarily bear the costs of translation into the language they want. The costs the language group is to bear are split between the members in proportion to the amounts of their contributions to UPU expenditure. In line with decisions by the UPU's Executive Council each group appoints a spokesman with whom the International Bureau discusses the administration of the translation service.

7. The Spanish Language Group (GLES) is one such group. Its spokesman is the Secretary-General of the UPAEP and it does not have legal personality. The Spanish Translation Service (STES) forms part of the UPU's International Bureau. The Executive Council of the UPU set it up in 1966 as an autonomous body. It is accountable to the GLES. It is governed by Regulations of 12 May 1980 which say that it is a small unit of the Bureau that does "urgent translation into Spanish"; that the Bureau "shall, in its capacity as authorized agent of the GLES, ensure the operation and administration of the STES"; and that the staff of the STES have "the same conditions of service as the staff members of the UPU International Bureau", of which the Staff Rules and Regulations apply to them "by analogy".

8. Besides the translation service in Bern, the GLES has set up a "decentralised translation system" at UPAEP's headquarters in Montevideo. It is independent of the UPU and its staff have an employment relationship with the International Bureau only when seconded to the translation service in Bern.

9. The UPAEP recruited the complainant in 1969. She was seconded to the STES at the International Bureau from 1 June 1974 to 18 December 1976 and from 16 December 1989 to 31 December 1992 and while there was covered by the UPU Staff Rules and Regulations. But, being a member of the UPAEP's translation service in Montevideo, she had the status of a staff member of its General Secretariat, and it is not an international organisation that has recognised the Tribunal's jurisdiction.

10. To get round the difficulty she offers several pleas. One is that according to precedent the UPU's recognition of the Tribunal's jurisdiction extends to its component language groups. Another is that the general principles of international law and several international conventions require that the employee of an international organisation should in the event of dispute have the right of appeal to an independent and impartial tribunal. Whatever the force of those pleas, she cannot succeed.

11. Several judgments do affirm the Tribunal's competence to entertain complaints from staff members of the UPU's translation services. Judgment 122 (*in re* Chadsey) ruled that the Tribunal was competent to entertain a complaint from a translator appointed by the UPU to the English Translation Service on a six-month contract that was twice renewed. The Tribunal held that, the Director-General of the Union having accepted its jurisdiction, this acceptance was also binding as regards the language groups since it was a service within the framework of the UPU. But that ruling does not apply here. Translation into English was done by a permanent central service of the International Bureau and by analogy its staff had the same status as the employees of the Union. Likewise, Judgments 868 (*in re* Zayed No. 1), 1013 (*in re* Zayed Nos. 4 and 5) and 1043 (*in re* Zayed No. 6) were about cases in which a translator from the Arab Language Group was challenging dismissal. The Tribunal said that the language groups "lack legal personality of their own" and that the UPU's recognition of its jurisdiction held good "for the Arab and other language groups of the Union as well" and that it was competent because the complainant was a staff member of the UPU and was guaranteed the same status as the employees of the International Bureau. This case is quite different. The complainant is a staff member not of the UPU but of the UPAEP. She had the status of a staff member of the International Bureau only while on secondment to Bern. The case law she cites is irrelevant to a dispute with an international organisation that has not recognised the Tribunal's jurisdiction.

12. So she cannot succeed in her plea — which she may plead before a domestic court — that refusal to entertain her case would be denial of due process and contrary to general principles, to the Universal Declaration of Human Rights and to the American Convention on Human Rights of 22 November 1969. However valid the principle she cites — that an employee of an international organisation is entitled to the safeguard of an impartial ruling by an international tribunal on any dispute with the employer — the Tribunal cannot but declare that it is not competent.

13. The conclusion is that her claim to the quashing of the decision she impugns must fail and so too must her other claims.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

WILLIAM DOUGLAS MICHEL GENTOT JULIO BARBERIS

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-THIRD SESSION

***In re* Agnihotri and others** **Judgment 1645**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed against the World Health Organization (WHO) on 4 March 1996 by:

Mr. N. S. Agnihotri
Mr. S. Agrawal
Mr. S. P. Ahuja
Mr. A. K. Bansal
Mr. V. K. Batra
Mr. J. S. Battra (No. 2)
Mr. M. L. Behl
Mr. R. Bhandari
Mr. S. L. Bhardwaj
Mr. N. K. Bhatia
Mr. D. Chopra
Mr. H. Chopra
Mr. P. P. Chopra
Mr. J. K. Dass
Mr. P. Dass
Mrs. C. Debnath
Mr. P. Diwan
Mr. N. A. Doraiswami
Mr. S. S. Easwar
Mr. G. Chand
Mr. K. P. Gaur
Mr. P. Grover
Mr. S. K. Gupta
Mr. S. R. Gupta (No. 2)
Mr. U. Gupta
Mr. M. A. Harpalani (No.5)
Mr. S. D. Iyer
Mr. N. K. Jagasia
Mr. S. K. Jain
Mr. Y. Kapoor
Mrs. S. Katyal
Mr. M. L. Khera
Mr. Y. P. Khullar
Mr. A. S. Kohli
Mr. A. Kukreja
Mr. P. Kumar
Mr. S. K. Madanpotra
Mr. J. M. Mago
Mr. R. Malhotra
Mr. R. K. Malhotra (No. 2)

Mrs. A. Mathew
Mr. N. Mitroo (No. 2)
Mr. S. Muthusamy
Mr. J. S. Narula
Mr. K. C. Oberoi
Mr. R. S. Pahwa
Mr. D. C. Pathak
Mr. V. P. Rustagi
Mr. R. K. Sabharwal
Mr. R. Sampathkumaran
Mr. K. Satyamurthy
Mr. D. N. Sethi (No. 2)
Mr. V. K. Sethi
Mr. A. K. Sharma
Mrs. R. Sharma
Mrs. S. Stephens
Mr. A. Singh
Mr. G. Singh
Mrs. R. Srinivasaratnam
Mr. P. K. Sundaresan
Mr. B. L. Taneja
Mr. P. S. Thakur
Mr. V. K. Thakur
Mr. B. M. Tokish

Considering the WHO's single reply of 10 September and the complainants' letter of 18 September 1996 informing the Registrar of the Tribunal that they did not wish to rejoin;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainants are employed by the WHO in its Regional Office for South East Asia (SEARO) at New Delhi. The salaries of the staff in the General Service category, which the complainants all belong to, are set and reviewed according to the provisions and method that were described, under A, in Judgment 1160.

By a memorandum dated 3 December 1993 a personnel officer announced the implementation of revisions to salary scales in the General Service category: as from 1 April 1992 for revision 35 and 1 January 1993 for revision 36. The complainants filed appeals against that decision on 11 February 1994.

In a report of 25 November 1994 the regional Board of Appeal recommended that the Regional Director should refer the matter to the

Organization's headquarters for review of the scales in revisions 35 and 36 in the light of "facts" about the cost of housing. In letters of 31 January 1995 the Regional Director rejected their appeals.

On 1 May 1995 they put their case to the headquarters Board of Appeal. In its report of 9 October the Board recommended rejection. By a decision conveyed in a letter dated 28 November 1995, which they impugn, the Director-General endorsed the recommendation of the headquarters Board.

B. The complainants submit that the revised salary scales are unlawful. They allege failure to take account of essential facts, breach of the applicable method and absence of "proper" consultation with staff representatives.

They seek (1) the quashing of the impugned decision; (2) prompt revision of the salary scales "based on" the recommendations of the Local Salary Survey Committee for revisions 35 and 36; (3) reimbursement of costs their counsel incurred during hearings at the headquarters Board of Appeal; (4) "corrective action" and "appropriate salary scales" based on recommendations by the Local Committee for revisions 37 and 38; and (5) 5,000 United States dollars each by way of moral damages. They also claim $1,500 each in costs.

C. In its reply the Organization argues that the complaints are in part irreceivable and in any event devoid of merit. As to the complainants' claims concerning revisions 37 and 38 it observes that they have failed to exhaust the internal redress open to them. It is not the Organization's practice to refund expenses for counsel to attend hearings of the headquarters Board at the request of an appellant. The WHO denies offending against the applicable rules and says it applied the method adopted by the International Civil Service Commission.

CONSIDERATIONS

1. These complaints come from sixty-four locally recruited staff who belong to the General Service category in the WHO's Regional Office for South East Asia (SEARO) in New Delhi. They are challenging two salary revisions, No. 35, which took effect at 1 April 1992, and No. 36, which took effect at 1 January 1993.

2. WHO Staff Regulation 3.2 provides:

> "... The salary and allowance plan shall be determined by the Director-General following basically the scales of salaries and allowances of the United Nations, provided that for staff occupying positions subject to local recruitment the Director-General may establish salaries and allowances in accordance with best prevailing local practices ..."

WHO Staff Rule 1310.3 is to the like effect.

3. The salary scales of locally recruited staff in the General Service category are reviewed every three to five years on the strength of comprehensive surveys of the best prevailing local practice. In between such surveys interim salary adjustments may be made on the strength of what are called "mini-surveys". In 1985 the International Civil Service Commission (ICSC) issued a "general methodology" for making the surveys. The Consultative Committee of the United Nations on Administrative Questions (CCAQ) has published a Manual on how to apply that methodology. According to the Manual the survey is conducted at each duty station by a Local Salary Survey Committee (LSSC), which consists of representatives of the local staff and administrations of the organisations concerned. If no such Committee exists, the "designated agency" for the duty station must establish one. The WHO, or rather its Regional Office, is the "designated agency" for New Delhi.

4. The Manual requires the Local Committee to submit its report and recommendations to the "designated agency" and that agency to submit its own report and recommendations to the "responsible agency" for review and decision. In this instance it is WHO headquarters in Geneva that is the "responsible agency". In the course of review the responsible agency may ask for explanations and additional data and make such changes in the results of the survey as it thinks justified. The review concludes with the approval by the responsible agency of the salary scales and allowances.

5. The Manual lays down the following procedure for reporting the responsible agency's decision:

> "A final report is prepared by the Headquarters of the designated agency following the review and approval by the responsible agency. Prompt submission of this report is an essential step in the survey process, contributing to better understanding by staff in the field and to more effective surveys in the future." (Manual, Part IV, Step F.7)

6. A comprehensive survey was carried out in New Delhi in 1990, and the result was Revision 30, which took effect at 1 June 1989. There followed

in quick succession several mini-surveys which resulted in Revisions 31, 32, 33 and 34. Those revisions meant uniform salary increases of 7.8, 9.2, 11.2 and 15.2 per cent respectively, and they took effect at 1 January 1990, 1 July 1990, 1 April 1991 and 1 September 1991.

7. In 1993 the Local Committee conducted another mini-survey using data about four of the five "comparator employers" — i.e. the local employers who are taken for the purpose of comparison — that the comprehensive survey for 1990 had covered. It submitted two reports to SEARO, which in turn forwarded them to headquarters expressing complete agreement.

8. In its report on that mini-survey the Local Committee observed that some comparator employers were providing company housing benefits for management staff, for instance by paying large interest-free deposits to landlords for housing, which was then let at low rentals. It recommended changing the method of reckoning the value of such housing benefits "from the notional market rental which is very difficult to ascertain, to the 'cost-to-the-employer' basis" on the grounds that there would otherwise be "serious distortions which it [would] be impossible to correct even at the time of [the next] Comprehensive Survey".

9. The Local Committee also found that two of the four comparator employers had recently been recruiting management staff at rates — known as the "hiring rates" — above the minimum of the established salary scales, and that some employees were still getting salary increments even after reaching the maximum of the scales applicable to them. It recommended treating those "hiring rates" as the minimum of the scales for the purpose of comparing salaries.

10. While in favour of two salary increases, one as from 1 April 1992 and the other from 1 January 1993, it recommended making different, or "staggered", percentage increases for four categories of staff, instead of a single uniform increase. The reason it gave was that the employment market in India was volatile:

> "... remuneration packages for the managerial category are moving very fast as compared to the lower level staff. Continuous application of [a] single percentage increase will generate UN scales which would be far removed from the market data, correction of which [would] be very difficult if not impossible at the time of the next comprehensive survey."

11. After review WHO headquarters, the responsible agency, rejected Local Committee's recommendations on housing benefits, hiring rates and staggered increases. Instead it approved uniform salary increases of 7.5 per cent as from 1 April 1992 under revision 35 and of 12 per cent as from 1 January 1993 under revision 36. That is the decision the complainants are objecting to. Having exhausted their internal remedies, they seek the quashing of the final decision confirming that decision, the implementation of the Local Salary Survey Committee's recommendation and the award of costs incurred by their representative at the hearings before the headquarters Board of Appeal. They also ask for "corrective action ... based on the LSSC recommendations relating to Revisions 37 and 38".

Housing benefits

12. The complainants advance three arguments in support of the so-called "cost-to-the-employer" formula recommended by the Local Committee.

13. The first is that there had been such changes in the practice of comparator employers as to justify the adoption of a different method of "quantifying" housing benefits.

14. The CCAQ Manual provides in Part V.I.A.5:

> "The method for the quantification of benefits should also normally remain constant, unless a significant change has occurred in comparator employer practice since the comprehensive survey. In such a case a modification may be considered."

The complainants' plea must fail because the Local Committee's two reports did not show that any change in the practice of comparator employers as to housing benefits had occurred since the previous comprehensive survey in 1990. On the contrary, previous Local Committee reports and clarifications show that the practice had been the same even at the time of the comprehensive survey in 1990.

15. The complainants' second argument is that the United Nations Development Programme (UNDP) was using the "cost-to-the-employer" formula. But that is irrelevant: the practice of the UNDP related to "national professional officers", a category of staff not comparable to the General Service category.

16. Thirdly, the complainants point out that the International Civil Service Commission endorsed a new methodology that applied the "cost-to-the-employer" formula. Though that is true, the change was inapplicable to

the impugned revisions because it did not take effect until 1 July 1993, after the date of the mini-survey and the effective dates of the revisions. It would have become applicable to the next comprehensive survey which, as the defendant observes in its reply, should have been conducted in 1994 but was delayed by the Local Committee until 1995. The provision that applied to Revisions 35 and 36 was Part II.C.8.1 of the same Manual:

> "Non-cash quantifiable benefits should normally be converted into monetary terms on the basis of their market value ... rather than cost to the employer."

That text covered mini-surveys, and, according to paragraph 4 of Appendix IX to the Manual, "non-cash" benefits included housing provided free of charge or at reduced rental.

17. The conclusion is that the decision not to adopt the "cost-to-the-employer" formula shows no flaw.

18. As to the comparison of salary rates the Manual contains the following provisions:

Part V.I.A.5:

> "Up-to-date salary data are collected for the pre-determined comparison points ..."

Part V.II.C.3:

> "The minimum salary rates retained at the time of the last comprehensive survey would need to be updated for the relevant employers and jobs. The analysis will normally be based on minimum salaries only; determination of the adjustment to maximum salaries will not generally be necessary."

19. The Local Committee's two reports did not show that comparator employers had officially changed their established salary scales. The WHO was therefore right to keep to the predetermined points of comparison instead of adopting the new "hiring rates". Any change in the methodology was a matter for the next comprehensive survey.

"Across-the-board" increases

20. The complainants contend that by granting "across-the-board" increases to all members of the General Service category of staff the WHO "created a situation with dangerous portents of bringing in data at the time of the next comprehensive survey which might result in very heavy negative indexation for the lower categories".

21. According to both the methodology and the Manual uniformity of increases was the norm. Paragraph 72(c) of the methodology reads:

> "The movement of outside salaries should normally be expressed as a single percentage which would not affect intergrade and step relativities."

and Part V.II.D.1 of the Manual:

> "In arriving at the revised scale, resulting from interim adjustment procedure, an across-the-board percentage increase should normally be applied to the existing scale. By applying a single percentage increase at all grades, the general structure of the salary scale remains intact ... An exception to the above norm could be considered if major changes have occurred in the structure of comparators' scales and if disregarding such changes would cause difficulty at the time of the next comprehensive survey."

22. The need to consider making "staggered increases" seems to have arisen because the Local Committee assumed that salaries had risen much more for management staff than at lower levels. That increase appears, however, to have been almost wholly due to the application by the Committee of the new methods of reckoning housing benefits and comparing salaries.

23. The complainants having thus failed to show any significant changes either in the salary scales of comparator employers or in their practice as to housing benefits, no exception to the norm of uniform increase is justified.

Staff participation

24. The complainants allege that the WHO violated the methodology, the Manual and the Staff Regulations by "unilaterally and drastically" reducing the increases recommended by the Local Committee and by implementing the revisions determined at headquarters without reporting back to the "designated agency" or to the Committee.

25. Article VIII of the Staff Regulations requires the Director-General to make provision "for staff participation in the discussion of policies relating to staff questions", and the Manual provides that the Local Committee "is the forum for staff-management and inter-agency consultations during the salary survey process".

26. The Tribunal held in Judgment 1279 (*in re* Almazán-Aguirre and others), which the complainants have cited, that the "requirement of Article VIII would ordinarily be met by staff participation in the work of the Local Salary Survey Committee", but that in that case there had been breach of it in the failure to consult the Local Committee before discarding two

comparator employers it had chosen and replacing them with two others. In the present case the WHO did not in carrying out its review introduce any new element of which the Committee had been unaware. Since it held to the methods and principles consistently applied in and after the 1990 comprehensive survey, the circumstances called for no further consultation. Nor is there any provision in the methodology or the Manual which requires the responsible agency to refer the changes made back to the designated agency or to the Committee; on the contrary, the Manual expressly provides in Part IV.F.3.5:

> "In completing its review, the responsible agency may introduce modifications to the survey results which it considers justified."

The costs of internal appeal hearings

27. Staff Rule 1230.7 entitles a complainant to the reimbursement of the expenses incurred by his representative for the purpose of attending hearings before the headquarters Board of Appeal only if that Board so recommends. In this case it made no such recommendation, and the complainants' claim to costs fails.

Other claims

28. The complainants ask the Tribunal to join with the present complaints an internal appeal that staff of SEARO have lodged with the regional Board of Appeal relating to Revisions 37 and 38, which took effect from 1 November 1993, and to direct the responsible United Nations agencies to stop the use of a draft Manual prepared to reflect the changes in the methodology which the International Civil Service Commission decided upon in 1993.

29. The complainants have failed to exhaust their internal remedies in pursuing those claims, which are therefore irreceivable under Article VII(1) of the Tribunal's Statute.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

Wm Douglas

WILLIAM DOUGLAS

Michel Gentot

MICHEL GENTOT

MARK FERNANDO

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-THIRD SESSION

***In re* Pinto** **Judgment 1646**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Antonio Pinto against the International Telecommunication Union (ITU) on 12 September 1996, the ITU's reply of 30 October, the complainant's rejoinder of 26 November and the Organisation's surrejoinder of 19 December 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Bolivian who was born in 1950, joined the staff of the ITU on 6 June 1984 and was assigned to its Library and Archives Service. He was granted short-term contracts and then, on 2 October 1987, a permanent appointment at grade G.5.

On 21 April 1995 he applied for the grade P.3 post of head of the Registration and References unit, which belongs to the Terminology, References and Computer Aids to Translation Section of the Department of Conferences. The notice of vacancy required a "university degree in languages or documentation or equivalent, or education in a reputed college of advanced education, with a diploma of equivalent standard to that of a university degree in the field of the post". It also required "a minimum of four years of experience as a documentalist". By a letter of 27 September 1995 the chief of the Personnel and Social Protection Department told the complainant that he had not got the post.

On 3 November 1995 the complainant put to the Secretary General a request for review of that decision on the grounds that the process of preselection had been improperly carried out and was not impartial. The Secretary General rejected his request in a memorandum of 27 November 1995.

On 8 December he repeated his request on the grounds that the appointment of the successful candidate, Mrs. Sylvie Pitt, was in breach of Staff Rule 4.7.1(b), which forbade employing members of the same family in the same department if one of the posts they held was subordinate to the other. In a memorandum of 11 December the chief of Personnel dismissed that objection as irrelevant.

On 26 February 1996 the complainant went to the Appeal Board. In its report of 5 June 1996 the Board held that the lists of candidates drawn up by the preselection panel and by the Appointment and Promotion Board were flawed because they included Mrs. Pitt and others who were not qualified for the post. The Board further held that, since Mrs. Pitt's post and her husband's were not in the same line of authority, there had been no breach of Rule 4.7.1(b). It recommended having the two lists revised with due regard to the qualifications required in the post description and to the candidates' own. By a memorandum of 5 July 1996, however, which is the impugned decision, the Secretary General rejected that recommendation.

B. The complainant is objecting to the lawfulness of the two lists on the grounds that Mrs. Pitt and some of the others included lacked the qualifications stipulated in the notice of vacancy. In his submission the appointment was a foregone conclusion, Mrs. Pitt being added to the short list at the last moment on the instructions of the chief of Personnel acting as secretary to the Appointment and Promotion Board. The complainant believes that he was the only properly qualified internal candidate. In assessing the candidates the Secretary General did not lend due weight to the qualifications and experience required.

The Secretary General acted in breach of the confidentiality of the appeal proceedings by sending a copy of his appeal to the head of the section to which the post belonged and to Mrs. Pitt's husband, the head of the English Translation Section.

He seeks the quashing of the appointment of Mrs. Pitt; the cancellation of the preselection list and the short list; the review of those lists with due regard to the qualifications required in the post description and to the candidates' own; and awards of 100,000 Swiss francs in damages for moral injury and 320,000 in damages for "injury to career". He asks the Tribunal to set a time limit for the execution of its judgment.

C. In its reply the Union says that the Appointment and Promotion Board has wide discretion under paragraph 17 of its Rules of Procedure, which reads:

> "In establishing this short list, the Board shall give primary consideration to the qualifications of the candidates in relation to the job requirements set out in the vacancy notice. However, it may decide that some of the required degrees and diplomas may be replaced by special experience, over and above the minimum required in the field of work of the advertised post."

In the defendant's submission Mrs. Pitt's qualifications and good record of service made up for her lack of a university degree and earned her a place on the short list.

Relevant, too, are the texts that exhort the Union to employ women and to improve the career prospects of staff in the General Service category and afford them access to the Professional category.

The Appointment and Promotion Board properly assessed the complainant's qualifications and experience by putting him too on the short list. But his record was not quite up to scratch and persuaded the Secretary General that he was not the best candidate.

Mrs. Pitt was not added at the last moment to the short list: indeed it is offensive to the members of the Board to suggest any such thing.

The plea of breach of the rule against employing members of the same family is mistaken because Mrs. Pitt's post and her husband's are not in line of authority.

As for the alleged breach of confidentiality in the appeal proceedings, the Secretary General is free, indeed bound, to consult anyone he thinks fit, especially someone who has been named in proceedings.

D. In his rejoinder the complainant questions the Union's profession of eagerness to employ more women but submits that in any event the policy must not preclude the fair geographical distribution of employment. Though paragraph 17 allows the "replacement" of "required degrees and diplomas", it does not dispense with experience: the notice of vacancy required experience of documentation, but Mrs. Pitt did not have it.

E. In its surrejoinder the Union argues that the complainant can show no cause of action since he had no hope of success anyway. Fair geographical distribution is not a prime criterion in rating candidates and in any event applies only to recruitment. The complainant puts too narrow a construction on paragraph 17.

CONSIDERATIONS

1. The complainant joined the staff of the ITU on 6 June 1984 as a library assistant. He held short-term appointments. After probation he got a permanent appointment on 2 October 1987. Reforms entailed the redeployment of staff and on 1 January 1996 he moved to the Archives and Microfilm Section.

2. On 28 March 1995 the Union issued a notice, No. 8-1995, approving a vacancy for head of the Registration and References unit. The post was numbered CF15/P3/907. On 21 April the complainant applied for it. On 27 September 1995 the chief of the Personnel and Social Protection Department told him that he had not got it.

3. On 3 November 1995 he put to the Secretary General of the Union a request for review of that decision on the grounds that the successful candidate, Mrs. Sylvie Pitt, and others should never have been put on the preselection list and the short list because they lacked the required university degree and experience. By a memorandum of 27 November the Secretary General answered that he was upholding his decision. On 8 December the complainant pressed his request. The chief of Personnel told him in a memorandum of 11 December that it was rejected and on 26 February 1996 he went to the Appeal Board. In its report of 5 June 1996 the Board recommended setting aside the two lists and redoing them. But by a memorandum of 5 July 1996 the Secretary General rejected that recommendation and upheld his decision of 27 September 1995. That is the impugned decision.

4. The material issue is whether it was lawful to appoint Mrs. Pitt to the vacancy on the strength of the notice and the outcome of the process of selection. There is a firm line of precedent about the sort of review that the Tribunal may exercise in such cases. As it has often said, a decision by an international organisation to make an appointment, being at the executive head's discretion, is subject only to limited review. The Tribunal will interfere only if there is some fatal flaw, such as a formal or procedural defect, or a mistake of law or of fact. And it will be especially cautious in reviewing an appointment because it may not substitute its own assessment

of the candidates for the organisation's. See Judgments 1077 (*in re* Barahona) under 4 and 1549 (*in re* López-Cotarelo) under 9.

5. The complainant challenges the lawfulness of Mrs. Pitt's appointment on the grounds of procedural flaws and mistakes of law, any one of which should, he says, prove fatal. In his submission the appointment offended against Regulation 4.9 because Mrs. Pitt did not have the qualifications stipulated in the notice and because the Appointment and Promotion Board made a mistake of procedure in drawing up the short list. He further pleads breach of Rule 4.7.1(b), which is about the employment of members of the same family.

6. Since the first plea is allowed there is no need to entertain any other. When an organisation chooses to hold a competition it must abide by its written rules and by the general principles set forth in the case law, particularly insofar as they govern the formal side of the process.

7. The Union issued on 28 March 1995 the notice about the vacancy that the complainant applied for. The post was head of the Registration and References unit, and among the stated qualifications were:

> "1. University degree in languages or documentation or equivalent, or education in a reputed college of advanced education, with a diploma of equivalent standard to that of a university degree in the field of the post.
>
> 2. A minimum of four years of experience as a documentalist, within a national telecommunications administration or with an international organization."

8. The complainant objects that appointing Mrs. Pitt overlooked requirement 2: she did not have the proper experience as a documentalist.

9. The Union argues that the Appointment and Promotion Board's choice was proper because paragraph 17 of its Rules of Procedure confers wide discretion, in making the short list, to give "primary consideration to the qualifications of the candidates in relation to the job requirements set out in the vacancy notice" and to "decide that some of the required degrees and diplomas may be replaced by special experience, over and above the minimum required in the field of work of the advertised post". The Union argues that in reliance on that text the Board took stock of Mrs. Pitt's experience of the ITU's documentation and publications, grasp of languages, proficiency in computer work, sound character and record of service, and felt that they so far made up for her lack of formal qualifications as to warrant short-listing her.

10. The plea fails. As the Appeal Board gathered from the personal records of the candidates on the preselection panel's list, Mrs. Pitt had neither the university degree nor the experience that the notice required.

11. The defendant contends on the strength of the complainant's personal file and his supervisors' reports on his conduct and performance that he was not up to the job anyway. That is neither here nor there. The Union has neglected the cardinal rule of any process of selection: the chosen candidate must have at least the qualifications stipulated in the notice.

12. The conclusion is that the administrative process for appointing the head of Registration and References was flawed and must be set aside in its entirety. The rejection of the complainant and the appointment of Mrs. Pitt cannot stand: see Judgments 1049 (*in re* Dang, Kapoor and Seshadri) and 1223 (*in re* Kirstetter No. 2).

13. The Union must now carry out anew the procedure for filling the post, this time in keeping with the rules. It may, however, in the meantime take whatever action it wishes to ensure that the work is still done and that Mrs. Pitt, who accepted her appointment in good faith, suffers no injury.

14. Since this judgment affords the complainant satisfaction, the Tribunal will not entertain his claim to damages.

DECISION

For the above reasons,

1. The Tribunal sets aside the decision of 5 July 1996 confirming the one of 27 September 1995 rejecting the complainant's application for the post announced in notice No. 8-1995 and Mrs. Pitt's appointment to that post.
2. His other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

WILLIAM DOUGLAS E. RAZAFINDRALAMBO JULIO BARBERIS

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-THIRD SESSION

***In re* Bombo N'Djimbi** **Judgment 1647**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Daniel Bombo N'Djimbi against the World Health Organization (WHO) on 5 April 1996 and corrected on 25 June, the WHO's reply of 15 October, the complainant's rejoinder of 17 December 1996 and the Organization's surrejoinder of 7 April 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal,

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant was born in 1936 and is a citizen of the country that at the material time was called Zaire. He joined the WHO in July 1981 under a short-term appointment at its Regional Office for Africa in Brazzaville. He took early retirement on 31 July 1995.

On 1 March 1982 he was put on a post, No. 3.2764, as a clerk-typist at grade BZ.5. On 1 June 1982 he was promoted to BZ.6. From 1 July 1986 until 30 June 1987 he served as an acting administrative assistant at grade BZ.9 on post 3.0069. His supervisors asked for the upgrading of post 3.2764 to BZ.9. The Organization upgraded it as from 1 December 1987 but only to BZ.7, and accordingly promoted the complainant, who was still on it.

In 1988 and in 1990 he made unsuccessful applications for the regrading of the same post to BZ.9. By a memorandum of 19 March 1992 a personnel officer of the Regional Office told him that at his supervisor's request the Regional Director had approved the upgrading of his post to BZ.8 and that he was promoted to that grade as from 1 March 1992. On

4 March 1993 he appealed to the regional Board of Appeal claiming the upgrading of his post to BZ.9 for the period from 1987 to 1990 and to BZ.10 from 1990. In a report dated 27 May 1994 the regional Board recommended not upgrading his post but, on the grounds that he had still been acting as administrative assistant from August until November 1987, granting him the difference in pay between BZ.6 and BZ.9 for those four months. The Board further observed that of the reports which he had been claiming on his performance the one for the period from June 1987 to May 1988 was missing and that "gave the impression that the competent unit had not been keeping his personnel records up to date". By a letter dated 28 June 1994 the Regional Director told him that he was rejecting the Board's recommendation for granting him the difference in pay. On 21 July 1994 the complainant appealed to the headquarters Board of Appeal. In a report dated 8 November 1995 that Board recommended rejecting his appeal. By a letter dated 7 December 1995, the decision impugned, the Director General told the complainant that he did so.

B. Citing the regional Board's report, the complainant contends that there was "incomplete consideration of the facts" within the meaning of Staff Rule 1230.1.2: the Board had had before it no report on his performance from June 1987 to May 1988. Headquarters were therefore wrong to reject his appeal. He was told of no decision that he should stop acting as administrative assistant and he therefore acted as such up to 31 July 1995, when he took early retirement. He contends that under Rule 320.4 he is entitled to further pay on that count. His post, No. 3.2764, ought to have been upgraded to BZ.9 because he was fit to perform the duties of an administrative assistant; indeed his supervisor had recommended the upgrading. Administration and boards alike were prejudiced against him.

He seeks the quashing of the Regional Director's decision of 28 June 1994 and the Director General's of 7 December 1995, the upgrading of post 3.2764 to BZ.9 from 1987 to 1990 and to BZ.10 from March 1990, the payment of the further sums accordingly due, and the payment of the special duty allowance from the date at which it stopped until 31 July 1995.

C. In its reply the WHO submits that the complainant's claim to the upgrading of post 3.2764 might be "deemed out of time and irreceivable" because he failed to lodge timely internal appeals against the decisions taken in 1987 and 1992 against upgrading to BZ.9. Likewise his claim to the special duty allowance is irreceivable because it is out of time and in any event quite new.

On the merits the Organization contends that according to Manual paragraph II.1.30 the grading of a post does not depend on the quality of the incumbent's performance or on his seniority. There cannot be regrading anyway failing some appreciable change in the nature of the duties. The duties of the complainant's post were still those of a secretary, whatever others he may have been asked to perform. The lack of one performance report, which the regional Board mentioned, does not amount to failure to keep his records up to date. Nor was he discriminated against. Nor may he in good faith plead that he got no notice of the termination of his status as acting administrative assistant as from 1 July 1987: a personnel action form dated 10 June 1987 told him that payment of the special duty allowance would stop at 1 July 1987 in accordance with Staff Rule 320.4. So his claim to payment of it is unsound.

D. In his rejoinder the complainant contends that the Organization ought to have put the post of administrative assistant up for competition or else kept him on the post, which was vacant. He maintains that the Administration never told him that he was to stop performing those duties and he cites Staff Rule 580.1, which requires the Administration to inform a staff member in writing of any change in his status.

E. In its surrejoinder the defendant presses its objections to receivability. It says that the complainant's claim to the upgrading of his post is a challenge to the decisions taken in 1987 and 1992. And his claim to the allowance is made for the first time in this complaint.

On the merits the defendant argues that the complainant's main plea, which is that he went on performing the duties of the administrative assistant's post from July 1987 until the date of retirement is irrelevant to his claim to the upgrading of his own post to BZ.9 and BZ.10. Moreover, it rests on a mistaken allegation of fact.

CONSIDERATIONS

1. The WHO appointed the complainant on 1 March 1982 to post 3.2764 in its Regional Office in Brazzaville as a clerk-typist at grade BZ.5. It upgraded his post and so promoted him to BZ.6 on 1 June 1982. On 1 July 1986 it had him take on for twelve months the duties of a post for an administrative assistant, No. 3.0069, that was graded BZ.9. In November 1987 it put a revised description of his own post, 3.2764, to the Standing Committee on Reclassification of Posts with a recommendation

from his supervisor for the upgrading of it to BZ.9. It thereupon went up to BZ.7 from 1 December 1987. After further applications for upgrading to BZ.9 the Standing Committee recommended on 30 August 1990 keeping the grade at BZ.7. The Regional Director agreed. In August 1991 the complainant again applied for BZ.9, but the Committee recommended only BZ.8. By a decision of 19 March 1992 he was promoted to BZ.8 as from 1 March 1992.

2. On 4 March 1993 he appealed against that decision to the regional Board of Appeal claiming the upgrading of his post to BZ.9 from 1987 to 1990 and to BZ.10 from 1990 to 1995. On the Board's recommendation the Regional Director rejected his appeal on 28 June 1994. On appeal the headquarters Board of Appeal too recommended rejection and the Director General endorsed that recommendation in a decision of 7 December 1995, the one now under challenge.

3. The Organization submits that the complaint is out of time and therefore irreceivable. There is no need, however, to rule on that plea since for the reasons set out below the complaint fails in any event on the merits.

4. At issue are the grades the complainant held from 1987 until 1990 and from 1990 until 1995. The WHO promoted him to BZ.7 in 1987, when the grade he wanted was BZ.9, and to BZ.8 in 1992, when he was claiming BZ.10 as from 1990. In support of his claims he cites Staff Rules 560.1 and 560.2. The case is not about transfer from one post to another, but about the regrading of the post he was on. The rules he is relying on are immaterial to upgrading: they are about the right to promotion on regrading. And here they were correctly applied since the successive upgradings of the complainant's post to BZ.7 and BZ.8 duly brought about his promotion.

5. In support of his claim to upgrading the complainant cites his supervisor's recommendations and his competent and devoted performance of the duties of the post he was temporarily assigned to, No. 3.0069.

6. Those arguments are, however, irrelevant. The basic rules on grading are in Manual paragraph II.1.30, which reads:

> "The following basic principles of post classification must be adhered to:
>
> 30.1 there should be equal pay for work of equal value;
>
> 30.2 posts of approximately equal difficulty and responsibility should be placed in the same grade;
>
> 30.3 a change in the grade of a post should result only when a significant change in the level of its duties and responsibilities has occurred;

> 30.4 the grading of a post depends upon the assigned duties and responsibilities required and not on the qualifications, job performance, seniority or other characteristics of an incumbent."

So grading hinges neither on quality of performance nor on seniority. The sole criteria are the duties and responsibilities of the post. And the grade cannot change unless there is a "significant change in [their] level".

7. As was said in Judgments 1067 (*in re* Glenn) under 2 and 1152 (*in re* Korolevich), also under 2, upgrading requires close familiarity with the conditions in which the staff member works. The assessment of the type of work performed and the level of responsibility is a value judgment, and only those whose training and experience equip them for the task may make such an assessment. The decision is, in other words, a discretionary one. So it is subject to review only on limited grounds and will not ordinarily be set aside unless it was taken without authority or in breach of a rule of form or of procedure, or was based on an error of fact or of law, or overlooked some essential fact, or was tainted with abuse of authority, or if a clearly mistaken conclusion was drawn from the facts. Consistent precedent has it that the Tribunal will not substitute its own assessment or direct that a new one be made unless it is satisfied on the evidence that there is a fatal flaw of that kind. So the complainant's performance of his temporary duties, even though his supervisor thought highly of it, is irrelevant to the question of upgrading his post 3.2764 to BZ.9. The plea fails.

8. The complainant argues that the defendant made an incomplete consideration of the facts in that it had no report on his performance from June 1987 until May 1988. Again the plea cannot succeed since, as was said above, grading depends on the content of the post and not on the incumbent's qualifications or performance.

9. The complainant contends that the descriptions of two other posts, 3.0624 and 3.3267, which are for administrative assistants and do bear grade BZ.9, include the same duties as his own. He objects to the upgrading of a BZ.8 post for an assistant to BZ.9 only six months after the holder of that post joined the unit. He infers that the boards were prejudiced against him.

10. Whether posts are much the same is an issue of fact. The regional Board said that it had made a thorough review of the descriptions of various posts that had formerly been graded BZ.7, BZ.8 and BZ.9 and had compared post 3.2764 with posts 3.0069 and 3.0624. It came to the

conclusion that the duties of the latter two were more important and that the Standing Committee on Reclassification of Posts had been right to upgrade 3.2764 in 1987 to BZ.7 and in 1992 to BZ.8. Even supposing that someone else at grade BZ.8 did rise swiftly to BZ.9, his case differs in that he was already on a BZ.8 post whereas the complainant was claiming promotion from BZ.6 to BZ.9. There being no evidence to cast any doubt on the regional Board's findings and conclusions, the Tribunal holds that the comparison the Board made does not bear out the charge of prejudice. The conclusion is that there is no fatal flaw in the decision not to upgrade the complainant's post.

11. He claims payment of the special duty allowance up to 31 July 1995, when he took early retirement, on the grounds that he went on performing the duties of post 3.0069 until that date, the defendant having failed to tell him that he was not to do so.

12. According to Staff Rule 320.4 temporary assignment to duties of a post at a higher grade than that of the staff member may not in any event exceed 12 months and it is only from the fourth month that the staff member is paid the special allowance. The defendant says that a personnel action form dated 10 June 1987 told him that he was not to get the allowance after 1 July 1987, i.e. at the end of the maximum period of 12 months allowed in 320.4. It explains that such a form is, in accordance with Manual paragraph II.4.150, sent to the staff member to inform him of any change in his contractual situation or entitlements. And it is the form that, according to Rule 580.1, constitutes "an amendment to the terms of appointment under Rule 440.3". That is how the headquarters Board of Appeal construed the rules: it held that the personnel action form sufficed to tell the complainant that the temporary attribution of the other duties was to end. There being no reason to depart from that view, the complainant's plea cannot be sustained.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

MELLA CARROLL E. RAZAFINDRALAMBO EGLI

A.B. GARDNER

Registry's translation,
the French text alone
being authoritative.

EIGHTY-THIRD SESSION

***In re* Leprince (No.3)**
(Application for review)

Judgment 1648

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by Mrs. Georgette Leprince on 3 August 1996 for the review of Judgment 1556, the reply of 12 September from the United Nations Educational, Scientific and Cultural Organization (UNESCO), the complainant's rejoinder of 25 September and the Organization's surrejoinder of 31 October 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. This is an application for the review of Judgment 1556 of 11 July 1996. The complainant had sought the quashing of the Director-General's decision of 28 August 1995 to transfer her to the office of the Assistant Director-General for Culture (CLT). By that judgment the Tribunal dismissed her case.

2. As the Tribunal has often said, its judgments carry the authority of *res judicata* from the date of delivery. Though they are subject to review, an application for review will be entertained only in exceptional cases. Several pleas for review are admissible provided that they have a bearing on the *ratio* of the judgment. One is the discovery of a so-called "new fact", i.e. a fact that the complainant was unable to plead in the original proceedings.

3. Although it is indeed the discovery of a new fact that the complainant is now relying on, the application fails for the reasons set out below.

4. The complainant says that the day after she read the text of Judgment 1556 she saw a minute that the Director of the Bureau of Personnel had written on 31 May 1994 to the acting Deputy Director-General. In her submission it goes to show that it was the new Assistant Director-General for External Relations who had prompted the impugned transfer and he had been serving his own interests by foisting his views on the Director-General against the Director's advice. In the complainant's view the minute affords proof of the abuse of authority which she had pleaded in the complaint dismissed in Judgment 1556.

5. Is that indeed a new fact? Or was she not already aware of the substance of the minute of 31 May 1994, and did she not plead accordingly in the original proceedings? The question is immaterial since in any event the minute does not affect the issue in dispute and the discovery of it does not warrant review.

6. Firm precedent has it that the plea of abuse of authority cannot succeed unless it is shown that the impugned decision was taken from some improper motive. The minute of 31 May 1994 makes two things plain: it was the Director of Personnel who took the decision of 15 June 1994 to transfer the complainant to the office of the Assistant Director-General for Culture; and for that purpose she was exercising authority delegated to her by the Director-General to transfer General Service category staff. It was in the exercise of such delegated authority that she resolved to hold over a decision until the new Assistant Director-General for Culture had seen the complainant and agreed to her transfer.

7. According to a minute that the Director of Personnel wrote on 21 October 1996 the acting Deputy Director-General had seen the future Assistant Director-General for Culture about transferring the complainant to his office before 20 June 1994, the date of her actual transfer. So the new Assistant Director-General presumably heard of the transfer from the acting Deputy Director-General, did not demur and thereby consented. The Director of Personnel does seem to have changed her mind and not awaited such consent before herself taking the decision. But there is nothing in the minute of 31 May 1994 or in any other item of evidence to suggest that the decision was intended to serve the personal interests of the Assistant Director-General for External Relations. Indeed the text of the minute suggests that he had failed to persuade the Director and that in any event,

before doing anything, she made an objective review of the arguments of both sides.

8. The conclusion is that there is no reason to suspect the Director of Personnel of having acted from any improper motive or in disregard of the Organization's interests. There was therefore no abuse of authority. Neither is the final decision of 28 August 1995, which merely endorsed the one of 15 June 1994, flawed with abuse of authority.

9. The complainant's arguments about events subsequent to Judgment 1556 being irrelevant, her application need not be entertained. Her plea of discovery of a new fact fails because the fact has no effect on the *ratio* of Judgment 1556.

DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

MELLA CARROLL E. RAZAFINDRALAMBO EGLI

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-THIRD SESSION

***In re* Langelez (No. 6)** **Judgment 1649**

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr. Jean-Claude Langelez against the European Organization for Nuclear Research (CERN) on 29 June 1995 and corrected on 19 February 1996, CERN's reply of 22 May, the complainant's rejoinder of 13 November 1996 and the Organization's surrejoinder of 20 February 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for the hearing of a witness;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case appear under A in Judgments 1104, 1172, 1490 and 1551 on Mr. Langelez's first, second, third and fourth complaints.

By a letter of 26 April 1994 the Director of Administration of CERN told the complainant that he was to be dismissed for serious shortcomings in the performance of duty. In a letter of 27 May he asked that he be dismissed on medical grounds and, in one of 8 June, that his case be put to the Joint Advisory Rehabilitation and Disability Board. The Board ruled on 5 July 1994 that his request for dismissal on medical grounds was irreceivable and the Leader of the Personnel Division so informed him in a letter of 8 July.

By a letter of 8 June 1994 the Director of Administration told him on the Director-General's behalf that he would be dismissed at 30 September 1994. On 7 July he lodged an "administrative appeal" with the Director-

General against that decision. The Director-General put his appeal to the Joint Advisory Appeals Board and in its report of 21 December 1994 it unanimously recommended rejecting it. By a letter of 16 January 1995 the Director informed the complainant that the Director-General did so and upheld the dismissal. By a letter of 27 January, which the Organization got on 30 January, he again asked the Director-General to put his case to the Disability Board and then to the Appeals Board and to reverse or suspend the decisions of 16 January 1995 and 8 June 1994. He states that he is challenging the implied rejection of those requests.

B. The complainant submits that his claims are not out of time: Articles 6, 7 and 8 of Annex 2 to Administrative Circular No. 14 (Rev.1) allow the filing of a claim up to ten years after the first appearance of the symptoms of service-incurred illness. He contends that the proceedings before the Disability Board were flawed since it gave him no hearing. He maintains that a change made in the shift system in 1985 was in breach of the Staff Regulations. When he protested he was taken off shift work altogether, and that, he says, was "sheer harassment". Citing legal opinion, he contends that his complaint is not time-barred. He seeks "the quashing of all the decisions affecting him ... since 3 October 1988 and to date".

He further seeks:

> "1. The quashing of the decisions of 16 January 1995 and 8 June 1994 dismissing the complainant, who was ill at the time and had not been reassigned, on the grounds that the dismissal was improper.
>
> 2. Damages for the unlawful dismissal.
>
> 3. The joinder of this complaint with his [third, fourth and fifth] complaints, which raise the same issues as have arisen since 1984 from the decisions which have caused him injury.
>
> 4. Recognition that the post referred to in the Director-General's decision of 15 January 1991 was abolished (reclassified), and compensation for the injury the complainant suffered because the Disability Board failed to keep continuous watch on the later attempts to reassign him, although the Organization had a duty to reassign him to similar work; and damages.
>
> 5. Recognition of the fact that the complainant was not reassigned.
>
> 6. Appointment of a medical expert to give an opinion on the state of the complainant's health and the causes and origins of his illness and the possibilities of reassigning him in the Organization, or on medically certified incapacity in accordance with the rules of CERN's Pension Fund, on the grounds that the Director-General implicitly rejected his appeal of 27 January 1995.

7. An award of damages for all the problems and harassment which he has suffered at the hands of CERN or certain senior officers and which caused his illness and had psychosomatic effects which made his health worse.
8. Compensation for loss of earnings since 30 September 1994, when he was unlawfully dismissed.
9. Immediate reinstatement in the Organization and referral of his case to the Disability Board for an expert medical opinion and to the Joint Advisory Appeals Board once the Disability Board has notified its recommendations to the Director-General, as requested by the complainant in his appeal of 27 January 1995 to the Director-General and before that, on 29 September 1994, to CERN's medical service and to the Leader of the Personnel Division under Administrative Circular No. 14; and compensation for the additional injury caused by the fact that all those requests, which were legitimate, went unanswered.
10. Confirmation of his illness in accordance with Administrative Circular No. 14, in particular page 5.
11. Damages for any other injury suffered by the complainant which might come to light in the course of examinations, consultations of experts or other procedures during the Tribunal's consideration of his case.
12. Damages for the particular injury caused by prejudice on his supervisors' part and by the Organization's failure to protect him against such abuse in disregard of the Rules and Regulations (cf. ... decision of 10 April 1985) and its failure to honour promises arising out of that decision, which was itself unlawful and which it imposed on him by trickery, duress and violence."

He asks the Tribunal to order CERN to produce the minutes of the meeting that the Joint Advisory Appeals Board held on 24 November 1994.

C. CERN contends in its reply that its not answering the complainant's letter of 27 January 1995 amounts, "not to rejection, but to mere confirmation of the rejection already notified to him in its letter of 8 July 1994". He may not now challenge that letter because he failed to lodge a timely internal appeal. So his complaint is irreceivable because there is no decision under challenge. It would in any case be irreceivable because he has failed to exhaust the internal means of redress, having lodged no appeal against the supposedly implied decision.

The Organization's pleas on the merits are subsidiary. It submits that of his manifold pleas and claims only his application for referral to the Disability Board is material. There are no medical grounds for such referral. Besides, the rules he cites on proceedings before that Board apply to cases that are already referred to it, not to the receivability of an application for referral.

D. In his rejoinder the complainant argues that the decision of 8 July 1994 declaring irreceivable his application for referral to the Disability Board was "null and void" because it failed to inform him, as the Staff Rules and Regulations required, of his further remedies. So it set off no time limit. Notice of the Organization's intention of dismissing him came from the Director of Administration on 26 April 1994; yet only on 26 May 1994 did the Director get "delegation of authority" from the Director-General to sign correspondence with the complainant. CERN hid the real reason for his dismissal: it was to punish him for seeking office with the Staff Association. Acting through the Leader of the Personnel Division, the Director-General wilfully put pressure on the Disability Board.

CERN has failed to produce, as he asked, the minutes of the Appeals Board's meeting of 24 November 1994. That is an unfair impediment to his right of defence and shows CERN's malice against him. He seeks on that count an award of 200,000 Swiss francs in damages. Over and above reinstatement he wants an award of damages, in an amount he puts at 2 million Swiss francs, "for loss of earnings up to the age of 65 ...".

E. In its surrejoinder the Organization contends that the complainant utterly misconceives the decision he is impugning. What he is in fact challenging is not the implied rejection of his claims of 27 January 1995, as the complaint form states, but the decision of 8 June 1994 dismissing him and the one of 8 July 1994 rejecting on the grounds of irreceivability his application to the Disability Board for dismissal on medical grounds. Both those decisions are now beyond challenge.

Even before the Director of Administration wrote his letter of 26 April 1994 he had authority to act on the Director-General's behalf. That letter cannot have been an act of reprisal since it was written before the complainant sought office with the Staff Association. CERN gave him a copy of the recording of the hearings before the Appeals Board; so it did meet his request.

CONSIDERATIONS

1. The main issue in this, the complainant's sixth complaint, is the lawfulness of the decision to dismiss him for serious shortcomings in the performance of duty. The factual background was set out under 1 to 3 in Judgment 1490 of 1 February 1996 on his third complaint.

2. By a letter of 26 April 1994 the Organization told him that it intended to dismiss him for unsatisfactory performance and that he might enter comment if he so wished. In his reply of 27 May 1994 he said that the rehabilitation proceedings that had followed CERN's acknowledgment of his disability had come to naught and that the proper way of putting an end to his appointment would be to dismiss him for "medically confirmed incapacity". By a decision of 8 June 1994 the Director of Administration confirmed his dismissal, on the grounds stated earlier, at 30 September 1994. In answer to a letter which the complainant had written on 27 May 1994 the Director explained that his ailments had already formed the subject of medical arbitration in 1988 and so there was no question of allowing his claim to dismissal for medically confirmed incapacity. On 7 July 1994 the complainant filed an internal appeal with the Director-General against that decision and the case went to the Joint Advisory Appeals Board. In its report of 21 December 1994 the Board recommended rejecting it. By a decision of 16 January 1995 the Director-General did so.

3. On 8 June 1994 the complainant had applied to the Organization for referral to the Joint Advisory Rehabilitation and Disability Board. That Board met on 30 June 1994. In its report of 5 July 1994 it observed that the complainant had been declared disabled in 1988, that he had been on regular day-shifts since 1991 and that he was not offering any new medical evidence. Its conclusion was that his claim to dismissal for medically confirmed incapacity was irreceivable. By a letter of 8 July 1994 the Leader of the Personnel Division told him of the Board's report.

4. On 29 September 1994 the complainant again applied for referral to the Disability Board. The Organization did not act on that application. On 27 January 1995 he put new claims to the Director-General to the quashing or suspension of the decisions of 8 June 1994 and 16 January 1995 to dismiss him and to the reconvening of the Appeals Board, after the review by the Disability Board that he had asked for on 29 September 1994. Again the Organization did not answer.

5. The complainant is objecting to the Organization's refusal to allow his claims of 27 January 1995. His main claims are that the Tribunal allow his application of 29 September 1994 for referral to the Disability Board and quash "the decisions of 16 January 1995 and 8 June 1994 dismissing the complainant, who was ill at the time and had not been reassigned".

6. The defendant submits that the complaint is irreceivable on the grounds that it is not challenging any decision to reject the complainant's internal appeals and that he has failed to exhaust his internal remedies. It contends that the absence of a reply to his claims of 27 January 1995 did not amount to rejection, but confirmed both the decision of 8 July 1994 to reject his claim to dismissal on the grounds of medically confirmed disability and the dismissal of 8 June 1994 confirmed on 16 January 1995.

7. There is no need to determine whether, as the complainant submits, there was new evidence in the form of medical certificates to support his application of 27 January 1995 for a new referral to the Disability Board, or whether the rejection of that application was mere confirmation of earlier rejections. All that need be said is that the complaint is challenging both the dismissal of 8 June 1994 confirmed on 16 January 1995 and the implied rejection of his application of 29 September 1994 for referral to the Disability Board.

8. According to Article VII of the Tribunal's Statute -

> "1. A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations.
>
> 2. To be receivable, a complaint must also have been filed within ninety days after the complainant was notified of the decision impugned or, in the case of a decision affecting a class of officials, after the decision was published.
>
> 3. Where the Administration fails to take a decision upon any claim of an official within sixty days from the notification of the claim to it, the person concerned may have recourse to the Tribunal and his complaint shall be receivable in the same manner as a complaint against a final decision. The period of ninety days provided for by the last preceding paragraph shall run from the expiration of the sixty days allowed for the taking of the decision by the Administration."

Moreover, according to Regulation R VI 1.05 of the CERN Staff Regulations which were in force at the material time a substantiated appeal against any decision by the Director-General must be made within sixty days of the notification of the decision challenged. If the Director-General, on receipt of a written claim, does not act on it within sixty calendar days, the time limit runs from the sixtieth day.

9. If he wished to challenge the final decision of 16 January 1995 confirming the one of 8 June 1994, the complainant had to come to the Tribunal within the ninety days provided for in Article VII(2) above as from the date of notification. Since he had notice of the decision on 20 January 1995, the last day for filing his complaint was 20 April 1995. Since he did not file it until 29 June it is irreceivable.

10. Insofar as the complainant is objecting to the Organization's failure to act on his claims of 29 September 1994, his complaint is again irreceivable. In accordance with the above rules the Director-General had sixty days in which to act on the request. If he failed to do so the complainant had sixty days plus ninety in which to file his complaint. So the deadline for filing his complaint was 26 February 1995. Again it is irreceivable.

11. The conclusion is that the complaint is irreceivable because the time limits in the Tribunal's Statute have not been met. The claims to awards of damages against the Organization must therefore also fail.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

MELLA CARROLL E. RAZAFINDRALAMBO EGLI

A.B. GARDNER

EIGHTY-THIRD SESSION

In re Angius (No. 3) | **Judgment 1650**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Piero Angius against the European Patent Organisation (EPO) on 24 September 1996 and corrected on 14 October, the EPO's reply of 20 December 1996, the complainant's rejoinder of 13 February 1997 and the Organisation's surrejoinder of 22 April 1997;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Italian who was born in 1948, has been on the staff of the European Patent Office, the secretariat of the EPO, since 1980. At the material time he was an examiner of patents at grade A3 in General-Directorate 1 at The Hague (DG1).

By a note of 5 September 1995 the Personnel Department told him that he was promoted to grade A4 as from 1 January 1995. From a staff announcement posted up on 13 May 1996 he gathered that two other members of the staff had been promoted retroactively as from 1 June and 1 October 1995. On 2 July 1996 he wrote to the Principal Director of Administration asking why he had not fared as well. The Principal Director's reply of 9 July was that the promotions of the other two, who were in categories B and C, had been granted by the Promotion Board for 1995 but the announcement had been held up until 1996. On 16 July the complainant lodged an internal appeal seeking promotion to A4 as from

1 April 1992. In this complaint he is impugning the implied rejection of that internal appeal.

B. The complainant contends that the EPO has been discriminating against him since 1992. By way of illustration he points out that, despite many reminders from him, the completed text of the report on his performance in 1990-91 was not sent to him until June 1994. That was obviously a stratagem to hold up his promotion to A4.

He contends that the EPO is failing to abide by the Tribunal's judgments and taking reprisals against litigants. He believes that only if the Tribunal awards him heavy damages will the Organisation, in particular DG1, be impelled to change its staff policy and "arrogant attitude".

He seeks promotion to A4 as from 1 April 1992 and awards of 1,800 German marks in costs and of at least 600,000 in damages. He asks the Tribunal to identify the responsible officers at least once by name and title.

C. In its reply the Organisation rebuts the complainant's pleas about discrimination and reprisals.

It observes that the impugned decision was sent to him over ten months before he filed his internal appeal. The staff announcement of 13 May 1996 and the explanatory letter did not amount to new facts setting off a new time limit for internal appeal. The Appeals Committee had told the complainant in a report on an earlier appeal of March 1994 that his promotion might be made retroactive. Since his internal appeal was not filed in time it was irreceivable. So too, therefore, is the complaint.

In subsidiary argument the EPO contends that the complaint is devoid of merit. Though the Promotion Board reviewed the complainant's case after the completion of the performance report in June 1994, it did not recommend retroactive promotion.

D. In his rejoinder the complainant enlarges on his pleas that the EPO was guilty of bad faith and abuse of authority, calculated to hold up his promotion to A4. He contends that the staff announcement of 13 May and the letter of 9 July 1996 did amount to new facts which showed that he was being discriminated against. His complaint is therefore receivable. It is also sound since the distinction which the letter drew between categories of personnel in the matter of retroactive promotion was not one that the EPO had ever made before and is quite unwarranted. Some of the promotions that the Organisation announced in January 1997 were backdated by more than a year. He challenges the defendant's allegation that the Promotion Board reviewed his case in 1994 in the light of his new performance appraisal.

E. In its surrejoinder the EPO maintains that the complainant is using the complaint as a pretext for putting to the Tribunal allegations which he made in his second one, on which Judgment 1344 ruled. It maintains that the complaint is irreceivable. It acknowledges that the possibility of retroactive promotion does not depend on the category of staff the employee belongs to, but points out that backdating is not a foregone conclusion. Thus the Promotion Board took into account, not just the general rating of the complainant's performance but also the ratings and comments he got for the quality and quantity of his work. It did not take the view that he deserved promotion before 1995.

CONSIDERATIONS

1. The EPO recruited the complainant in January 1980 as an examiner of patents in the field of mechanics. By a note dated 5 September 1995 its Personnel Department told him that he was promoted to grade A4 as from 1 January 1995.

2. On 13 May 1996 there was a staff announcement that two employees were promoted, one to grade B2 as from 1 October 1995 and the other to B5 as from 1 June 1995. The complainant wrote a letter on 2 July 1996 to the Principal Director of Administration pointing out that those employees had got promotion in 1996 as from dates in 1995; he wanted to know why he himself had not had the "same treatment".

3. In a reply dated 9 July 1996 the Principal Director told him that the promotions he had mentioned were the results of the Promotion Board's recommendations for 1995 but that, for reasons there was no need to explain, the announcement of them had had to be held over until 1996 and they had therefore been made retroactive.

4. On 16 July 1996 the complainant wrote a letter to the President of the Office asking that he be promoted to A4 as from 1 April 1992 or else that his letter be treated as an internal appeal under Articles 106 to 109 of the Service Regulations. Having got no answer from the Organisation, he filed this complaint on 24 September 1996 challenging the implied rejection of his appeal.

5. The Organisation pleads that the complaint is irreceivable on the grounds that what it is challenging is not a decision. The complainant filed his internal appeal in response to the Principal Director's letter of 9 July 1996, which merely gave him information he had asked for.

6. If the complainant intended his letter of 16 July 1996 to be an internal appeal against a decision not to promote him to A4 as from 1 April 1992, that decision can be only the one mentioned in the Personnel Department's note of 5 September 1995 telling him that his promotion to A4 took effect as from 1 January 1995. Viewed in that light, his complaint is irreceivable because he failed to lodge an internal appeal within three months of receiving that decision, the time limit set in the Service Regulations for such appeal. In fact ten months elapsed before he appealed. He therefore failed to exhaust his internal remedies, as Article VII(1) of the Tribunal's Statute requires.

7. He seeks to get round the time bar by saying that only on reading the staff announcement of 13 May 1996 did he realise that the information in the note of 5 September 1995 had been misleading: it had told him that promotion could not be retroactive as from a date earlier than 1 January of the year of promotion. The time limit of three months therefore — he argues — ran only from 13 May 1996 and his appeal of 16 July observed it.

8. The argument fails. As the Principal Director's letter of 9 July 1996 explained to him, the promotions mentioned in the staff announcement were made on the recommendations of the Promotion Board for 1995 and were retroactive as from dates in that year only because it had not proved possible to announce them until 1996. So, even on the complainant's own account, what he was told was not misleading: the promotions were the outcome of the exercise for promotion in 1995. He may therefore plead no extenuating circumstances to excuse the lateness of his internal appeal.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

W Douglas

WILLIAM DOUGLAS

Mella Carroll

MELLA CARROLL

E. RAZAFINDRALAMBO

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-THIRD SESSION

***In re* Wassef (No. 22)** **Judgment 1651**

THE ADMINISTRATIVE TRIBUNAL,

Considering the twenty-second complaint filed by Mr. Maher Nabih Wassef-Gerges against the Food and Agriculture Organization of the United Nations (FAO) on 4 November 1995, the FAO's reply of 16 February 1996 and the complainant's letter of 12 March 1996 to the Registrar of the Tribunal saying that he did not wish to rejoin;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Information on the complainant's career at the FAO appears under A in Judgment 1401 on his first and second complaints.

By a letter of 1 August 1995 the complainant appealed to the Director-General of the FAO asking him to make reforms, particularly in the internal appeal procedure and in the working of the Appeals Committee. Pending such reforms he asked the Director-General to suspend all the activities of the Committee and to pay him a total of 4 million United States dollars in damages for the negligence and misconduct of the Administration and the Committee and the breach of their obligations.

By a letter of 2 October 1995 the Assistant Director-General in charge of the Administration and Finance Department told him that his appeal was rejected on the grounds that his claims fell outside the ambit of Staff Regulation 301.111.

The complainant took the view that that reply of 2 October was "beyond the time limit" and therefore "irreceivable". He says he is impugning the implied decision to reject his appeal of 1 August 1995.

B. Citing Judgment 533 (*in re* Iverus), the complainant contends that since the Director-General failed to answer his appeal within sixty days he was free to come to the Tribunal.

He objects to the FAO's internal appeal procedure and in particular to the absence of a panel, provided for in Annex B to Manual Section 331, of staff members willing to serve as counsel to appellants before the Appeals Committee. He contends that both Administration and Committee acted in breach of the Staff Regulations and of their obligations towards the Tribunal. He believes that the twenty-two complaints he has filed show up the attitude of the FAO, which by use of "cheap Administrative machinery" and "immoral procedural tactics", is trying to screen its behaviour from judicial review. He contends that, had there existed a real appeal committee, he would have been spared emotional, moral and physical stress and further injury. He alleges injury to his reputation and to his "social life/surroundings".

He asks the Tribunal to:

> "1. declare that the internal means of redress within FAO are null and void,
>
> 2. order the establishment of sufficient safeguards for the staff members serving on both the Appeals Committee and the Panel of Counsel as requested by the Staff Associations in order for these staff members to properly assist, guide and represent appellants, and/or give their legal opinion and ruling on these matters,
>
> 3. order the revocation of the restriction on the representation of appellant by staff members in the Legal Office and in Personnel, and/or give their legal opinion and ruling on this issue,
>
> 4. order the establishment, soonest possible, of a provisory Panel of Counsel consisted by legal officers from the Legal Office until point (2) above is fully met, and/or give their legal opinion and ruling on the issue,
>
> 5. rule and/or give legal opinion on my requests to the Director-General under points 4, 5, 6 and 7 in the last page of my appeal, namely the following;
>
> '4. secure fairness, impartiality, clarity, time limits and honesty in the internal redress procedure and impose the strict respect of all parties involved by revoking the present inscrutable law-making process in all its aspects by amending Manual Section to include a time limit not to exceed 6 months for the submission of the Appeals Committee Report

to the Director-General from the date of despatch of appeal by complainant to the Committee,

5. impose the obligatory reporting of the Committee on the merit of each case,

6. impose a time limit for the final decision of the Director-General on the Committee Report,

7. postpone immediately all present activities of the Appeals Committee until the above corrective actions/measures have been secured and put into effect',

6. award me the payment of US $ 2 Millions as a compensation for the violation by this Administration and the Appeals Committee of the Organization's declaration to ILOAT and Article VII of the Statute of the Administrative Tribunal,
7. award me the payment of US $ 1 Million as a compensation for the wilful breach of obligations and gross negligence by this Administration and the Appeals Committee to the "applicable Staff Regulations", Rules, related Manual Section and to their principles and Spirit to the detriment of appellant
8. award me the payment of US $ 1 Million as a compensation for the grievances, damages and injuries which resulted from the wilful wrongdoings, conduct, favouritism, and gross negligence of this Committee to its obligations
9. to award me the payment of a lump sum of US $ 7,500.00 for cost,
10. award me a 25% per year of the total of above awards as cost of money calculated from the date of expire of the time limit for the Reply of the Director-General,
11. order the reimbursement by the FAO for the cost of publication of this judgement in 4 American, 4 European, 4 Asian and 4 Arab daily newspapers and magazines,
12. to include in this judgement a penalty clause for its execution within 30 days from the date of this judgement equivalent to 50% of the total of awards for every two weeks of delay by the FAO Administration."

C. In its reply the FAO contends that the complaint is irreceivable because the complainant has failed to exhaust his internal remedies. The decision he is impugning is not a final one, nor did he challenge it, as Staff Regulation 303.1313 prescribes, before the Appeals Committee.

By way of subsidiary argument it contends that most of the issues he raises have already been disposed of. One is his claim relating to the panel of staff members willing to serve as counsel to appellants, the main issue of his fourteenth and eighteenth complaints. Most of his claims do not properly form the subject of a complaint to the Tribunal because they have nothing to do with the observance or breach of a provision of the Staff Regulations. The FAO rejects his claims to damages.

CONSIDERATIONS

1. On 1 August 1995 the complainant, a former employee of the FAO, lodged an appeal to the Director-General asking him to carry out certain reforms, in the meantime to postpone all present activities of the Appeals Committee and to pay him compensation of 4 million United States dollars for breach of obligations, negligence and misconduct by the Administration and the Committee.

2. In a reply dated 2 October 1995 the Assistant Director-General in charge of the Administration and Finance Department stated that none of the complainant's claims in his appeal fell within the scope of Staff Regulation 301.111, which allows appeal regarding "a grievance arising out of ... an administrative decision which staff members allege to be in conflict, either in substance or in form, with the terms of their appointment or with any pertinent Staff Regulation, Staff Rule or administrative directive".

3. On 4 November 1995 the complainant filed this complaint seeking a declaration that the internal means of redress within the FAO are null and void together with other relief and awards of damages and costs.

4. The complainant argues that since more than sixty days elapsed between the lodging of his appeal with the Director-General and the Organization's reply he was entitled to come to the Tribunal to impugn an implied decision to dismiss his claim. He is mistaken. Staff Rule 303.1311 provides that a staff member may ask the Director-General to take a final decision and the time-limit for a reply is set in Staff Rule 303.1312 at sixty days for a person in the position of the complainant. Staff Rule 303.1313 provides that if no reply is received within the time limit the staff member may submit an appeal to the Appeals Committee. In this case the complainant has failed to exhaust such internal means of redress as were open to him under the Staff Rules. He has therefore failed to meet the requirements of Article VII(1), of the Tribunal's Statute and his complaint is irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

Wm Douglas

WILLIAM DOUGLAS

Mella Carroll

MELLA CARROLL

E. RAZAFINDRALAMBO

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Registry's translation,
the French text alone
being authoritative.

EIGHTY-THIRD SESSION

***In re* Rota (No. 4)** **Judgment 1652**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mrs. Adriana Rota Furlan against the World Health Organization (WHO) on 5 August 1996 and corrected on 20 August, the WHO's reply of 28 November 1996, the complainant's rejoinder of 4 February 1997 and the Organization's surrejoinder of 8 May 1997;

Considering Articles II, paragraph 5, VII and VIII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant is employed by the WHO at its Regional Office for the Americas (AMRO) in Washington D.C. Facts relevant to this case appear under A in Judgment 1599, which dismissed Mrs. Rota's third complaint.

On 4 April 1994 she saw that her name was not on the list of staff who were to get an award for ten years' service at the public ceremony for staff awards scheduled for the next day. She pointed that out to the chief of Personnel in a memorandum he received on the morning of 5 April. He answered the same day that staff whose performance had proved unsatisfactory or who had had a reprimand for misconduct were not ordinarily invited to such a ceremony, but that the Regional Director had agreed to make an exception in her favour; since there had not been time to tell her so before the start of the ceremony she would have the medal sent to her shortly. She got it through the post on 20 April.

On 28 April she lodged an internal appeal against the refusal to recognise her ten years' service. On 18 May 1995 the regional Board of Appeal, in Washington D.C., recommended rejecting her appeal and the Regional Director endorsed the recommendation in a letter he sent to her on 23 June. She appealed against that decision to the headquarters Board of Appeal, in Geneva, on 13 August 1995. On 21 March 1996 that Board too recommended rejecting her appeal but said that the Regional Office should look into the conditions in which she was working and, if need be, improve them. The Director-General endorsed the recommendations in a letter of 8 May 1996 to the complainant. That is the decision she is impugning.

B. The complainant submits that the Organization held her up to public "disgrace" by refusing to invite her to the ceremony. The headquarters Board of Appeal was inconsistent: it failed to impute to the Organization any wilful intent to "disgrace" her, yet held that its practice had not been the same for everyone. The Regional Director meant to invite her, but the Personnel Department disregarded his orders and so demeaned her in the staff's eyes. The chief of Personnel thereby imposed on her, without a hearing, a penalty that the Staff Rules do not provide for.

She seeks public recognition of her years of service; formal assurances from the WHO that she will not be subjected to maltreatment or punishment without due notice and a hearing; acknowledgement by the Organization that the decisions were in breach of its rules and practice and that she was in a state of disgrace; a promise to end the disgrace; damages; and costs.

C. In its reply the Organization submits that the complaint is irreceivable because what it is challenging is not, as the Staff Rules require, an administrative decision — the Director-General met her wish — but a so-called "state of disgrace". Besides, she shows no cause of action since she did get her medal and congratulations from the Administration on her ten years' service, and an invitation to next year's ceremony.

The complaint is devoid of merit anyway since there was breach neither of the Staff Rules and Regulations nor of the terms of her contract. Her claims to redress are groundless. As precedent makes plain, claims to "recognition" or "assurances" from the Organization fall outside the ambit of Article VIII of the Tribunal's Statute. It therefore asks the Tribunal to dismiss her claims in their entirety and award it token costs for vexatious litigation.

D. In her rejoinder the complainant maintains that her complaint is receivable since what she is impugning is not a "state of disgrace" but the decision not to invite her to the ceremony. The disgrace is one consequence of that decision. After her written reprimand she was transferred and given no work. That was an additional sanction. Citing Judgment 1599, she points out that the written reprimand, which ought to have been the only sanction, said nothing of barring her from the ceremony. Her exclusion was therefore unlawful.

Restating her claims, she asks the Tribunal to set aside the Regional Director's decision of 23 June 1995 and the Director-General's decision of 8 May 1996 and to order the Organization to reinstate her in the post she held before the reprimand, recognise her years of service publicly and give her duties commensurate with her experience and ability and a position not lower than the one she held prior to the reprimand. She seeks moral damages and costs.

E. In its surrejoinder the Organization submits that the complainant has utterly changed her pleas and claims in the light of the Tribunal's dismissal of her third complaint. Quite apart from the Tribunal's ruling in Judgment 1599 that her reassignment was no further penalty, her new pleas and claims are irreceivable because they did not form part of her internal appeals or her original complaint. In comments on her last performance report she expressed "enthusiasm" for her work. She acknowledges that the Regional Director did decide to invite her to the ceremony and later suggested that she attend next year's one. Since her claim to public recognition was thus satisfied, she shows no cause of action.

CONSIDERATIONS

1. Mrs. Rota has been an employee of the World Health Organization at its Regional Office for the Americas since November 1984. She is an office assistant II at grade G.5 and holds a fixed-term appointment, which the Organization recently extended to February 2001.

2. The Tribunal has already delivered judgments on three complaints from Mrs. Rota. Judgment 1599 of 30 January 1997 dismissed her third complaint, in which she challenged the imposition of a written reprimand and her transfer to another unit and another supervisor. In this complaint she cites that judgment several times.

3. She is challenging a decision which the Director-General took on 8 May 1996 on the recommendation of the headquarters Board of Appeal to reject her internal appeal. Since she has failed to supply the text of that appeal there is no telling whether the claims in her internal appeal match those she sets out in the complaint form. Yet firm precedent has it that a complainant may not put to the Tribunal claims other than those he made in his internal appeal.

4. The complainant is claiming:

"(a) Recognition of service in a public forum.
(b) A formal and official certification and assurance from PAHO/WHO that she will not be subject to any adverse treatment or punishment without being provided full notice and hearing rights.
(c) An acknowledgement by [the Organization] of violation of rules and practice in denial of recognition.
(d) Recognition by [the Organization] that Complainant has been under a state of disgrace and an end of that status.
(e) Damages.
(f) Reasonable attorney fees."

Thus her main claims are to public recognition of her services and to acknowledgment of her "disgrace" and the ending of it. Her other claims are to the issuance of further orders to the defendant.

Public recognition of the complainant's services

5. The complainant pleads that the Organization has the obligation of publicly recognising her services, whatever her behaviour may have been. She herself cites no written rule laying down any such obligation and there is no evidence of one in the Staff Regulations or in the Staff Rules or in the contract of service concluded between her and the Organization. But does such an obligation derive from custom? The complainant uses terms like "traditionally" and "customary" to suggest that it does. According to the international case law a custom arises only if there is evidence of repeated acts or of a consistent and unbroken practice that is deemed to be binding: *opinio juris sive necessitatis*. Not only does the complainant fail to prove any such practice but the defendant has shown that staff who have suffered disciplinary action do not always get public recognition of their services: it has produced evidence to show that some staff who had suffered disciplinary action were not granted such recognition. So there is no consistent and unbroken policy in the matter.

6. The conclusion from the foregoing is that there is no written or customary rule requiring the defendant to grant a staff member public recognition of his services, whatever his behaviour may have been. The complainant accuses the Organization of having acted in breach of the rules and practices in force. There being none, the Organization cannot have acted in breach of them.

7. The defendant says that it made an exception in the complainant's favour and invited her to the ceremony on 5 April 1994; but since it was unable to let her have its invitation in time it sent her the medal and a letter of congratulations instead. It invited her to attend a public ceremony in 1995, but she turned down the invitation.

8. The complainant says that she was unable to attend the ceremony of 5 April 1994 because several officials were remiss in passing the invitation on. She says -

> "... the [Regional Director] had a good intention to include her, Personnel did not carry out his order and the consequences were that Complainant was not included in the Public Ceremony."

There is indeed a dispute between the parties over whether the officers complied with instructions to forward the invitation to the complainant. That is a matter at the Organization's discretion and is not subject to judicial review. The Tribunal will not go into matters such as determining whether an official is late for work, or is rude, or is improperly dressed — *de minimis non curat praetor* — even though such behaviour may sometimes cause injury to others. The Tribunal would go into such issues only if the Administration had taken disciplinary action and the internal means of redress had been exhausted.

9. For the reasons set out above and in Judgment 1097 (*in re* Facchin) under 6, the conclusion must be that the complainant's claim fails.

The complainant's "disgrace"

10. The complainant says that she is in "disgrace" and wants to see an end to it. No doubt what she means is "disgrace" in a legal sense, though she gives no particulars. In Judgment 1270 (*in re* Errani No. 2) the Tribunal said:

> "The grievances [the complainant] has put to the Tribunal show his utter ignorance of the appeal procedure as set out in the Service Regulations. ... the filing of an appeal presupposes that the Organisation has already taken a decision

> that adversely affects the staff member or that he has submitted to it a request for a decision he is entitled to under the Regulations."

The present complainant has failed to identify any decision which would have put her in "disgrace". She believes it began when she was barred from the public ceremony of 5 April 1994. As was said in 7 above, however, she did get a medal in recognition of her services and was invited to attend a public ceremony in 1995, although she turned down the invitation.

11. In her rejoinder she treats the failure to grant her public recognition of her services as a second disciplinary sanction for her misconduct of 9 July 1993, which brought her the written reprimand. She pleads a "principle of law of the civilised nations". Although she does not use the term, no doubt she means the rule against double jeopardy, a widely acknowledged precept of criminal law.

12. Her plea fails because it misreads the facts. When someone wins a prize in a competition, the others suffer no penalty: they merely fail to get the prize. At the public ceremony of 5 April 1994 some got prizes, while the complainant and others did not. Yet they suffered no disciplinary sanction on that account.

13. There being no need to rule on the defendant's objections to receivability, nor on its counterclaim, the complainant's claims fail in their entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

WILLIAM DOUGLAS MELLA CARROLL JULIO BARBERIS

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-THIRD SESSION

***In re* Efféian** **Judgment 1653**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Ginette Efféian against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 12 December 1996, UNESCO's reply of 22 January 1997, the complainant's rejoinder of 14 February and the Organization's surrejoinder of 24 March 1997;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a French citizen who was born on 25 January 1935, joined the staff of UNESCO on 1 July 1979 as a secretary at grade G.3. She had her fixed-term appointment regularly extended until 31 January 1995, when she took retirement.

On 4 April 1990 UNESCO promoted her to grade G.4 as from 1 July 1988 on the regrading of her post, No. BRX-068, in the Bureau of External Relations (BRX). As from 1 February 1991 she performed some of the duties of a vacant post at grade P.1/P.2, No. BRX-067, for an assistant liaison officer (below described as post 67). In accordance with Staff Rule 103.17 the Organization paid her a special post allowance corresponding to grade G.5 from 1 May 1991. On 29 August 1994 it again upgraded her own post to G.5, and it promoted her to that grade as from 1 July 1993.

By a personnel action form dated 2 September 1994 it told her it would stop paying the allowance as from 1 July 1993. In a memorandum of

23 September 1994 to the Director of the Bureau of Personnel (PER) the Assistant Director-General for External Relations said that, since the complainant was still performing some of the duties of post 67, she should get the special post allowance at grade P.1/P.2 – adjusted to take account of her promotion to G.5 – as from 1 July 1993 and until the post was filled. In a memorandum of 22 November 1994 the Director answered that, having consulted the classification section of the Bureau of Personnel, she took the view that the duties of post 67 that the complainant was performing warranted only grade G.5; she was therefore refusing the claim. On 10 February 1995 the Assistant Director-General sent the Director a claim to retroactive payment of the allowance to the complainant on the grounds that she had performed "many" of the duties of the post until 31 October 1994, the date at which her section had taken on temporary help. In a memorandum of 3 March 1995 to the Assistant Director-General, the Director confirmed that the duties of post 67 that the complainant was performing were worth only G.5.

By a letter dated 19 May 1995 the complainant asked the Director-General to intercede to get "PER to pay the full allowance" retroactively stopped in September 1994. On 7 September 1995 the acting Director-General told her that he was confirming the Director of Personnel's decision of 3 March 1995. On 27 October she gave notice of appeal to the Appeals Board against the decision of 7 September 1995. She put her "detailed appeal" to the Board on 5 February 1996. In its report of 5 July 1996 the Board pointed out that she had not challenged the grading of the duties of post 67 at G.5 on getting the post allowance on 1 May 1991 and that in the assessment of them there was "no apparent error of fact or law"; it recommended rejecting her appeal. By a letter of 4 October 1996 the Director-General told her that he did so, and that is the decision under challenge.

B. The complainant says that, bit by bit, her supervisors had her take on almost all the duties of post 67. Since the post itself was graded P.1/P.2, how could the duties warrant only G.5? In her submission UNESCO acted in breach of Staff Rule 103.17(b), which is about the grant of the allowance, and of Manual paragraph 2320.33, which is about temporary assignment to higher duties for more than three months. In assessing post 67 the Organization applied the standards for grading General Service category posts, whereas it ought to have taken the Professional grading standards in Appendix 22A to the Manual.

The complainant claims in special post allowance the amount corresponding to a difference of one grade for the period from 1 July 1993 to 31 January 1995, plus interest at the rate of 10 per cent a year on the component sums as from the due dates within that period and on the total as from 31 January 1995; 100,000 French francs in material and moral damages; and costs.

C. In its reply UNESCO pleads that the complaint is irreceivable. It says that the letter which the complainant wrote to the Director-General on 19 May 1995 did not amount to a "protest ... in writing" within the meaning of paragraph 7(a) of the Appeals Board's Statutes. Besides not reading like a "protest", it ought to have been addressed to the Director-General through the Director of the Bureau of Personnel. The complainant had one month in which to challenge the personnel action form of 2 September 1994 stopping the allowance. She also filed her detailed appeal after the expiry of the time limit in paragraph 10 of the Statutes, which was one month following the notice of appeal.

As to the merits the Organization contends that the duties of post 67 that the complainant took on did not warrant paying the allowance after her promotion to G.5. The classification section of the Bureau of Personnel having assessed those duties, the findings were set out in a handwritten note dated 25 October 1994 and in greater detail in a note of 9 August 1996 by the head of the section. The decision to grade the duties at G.5 was in line with those findings and quite sound. Besides, the complainant did not challenge the payment of the special post allowance at that grade when she herself was at G.4.

D. In her rejoinder the complainant observes that the Appeals Board did not acknowledge receipt of her notice of appeal until 9 January 1996, when it asked her to enter her detailed appeal by 9 February. Since she did so on 5 February she met the time limit. She protested at once through her supervisors against the stopping of the allowance when told of it on 2 September 1994.

On the merits she argues that the note of 9 August 1996, though it does take account of the Professional grading standards, came after the Board had reported. The assessment it makes is wrong: although at first she was given only one-third of the duties of post 67 she was actually performing "85 per cent" of them - part time to begin with and then full time - from 1 July 1993 until 31 August 1994. In that period her own grade was G.5. And the post was filled at P.2.

E. In its surrejoinder the defendant presses its objections to the receivability of the complaint and its pleas on the merits. Citing precedent, it submits that grading a post, be it in the Professional or General Service category, is a matter of discretion. The decision in this case shows no fatal flaw.

CONSIDERATIONS

1. The complainant joined the staff of UNESCO on 1 July 1979 at step 1 in grade G.3. The Organization regularly renewed her fixed-term appointment until 31 January 1995, when she took retirement.

2. Her post, BRX-068, was upgraded to G.4 and then to G.5. She was retroactively promoted to G.4 as from 1 July 1988 and to G.5 as from 1 July 1993. As from 1 February 1991 she was required to perform some of the duties of another post, No. BRX-067, which was graded P.1/P.2 and was vacant. She was accordingly granted the special post allowance provided for in the Staff Rules at grade P.1/P.2 as from 1 May 1991. A personnel action form of 2 September 1994 told her that payment of the allowance would stop as at 1 July 1993.

3. On 9 September 1994 she put to the Director of the Bureau of Personnel a request that she should continue to get the allowance from 1 July 1993 until 31 January 1995. The Assistant Director-General for External Relations interceded in her favour with the Director of the Bureau of Personnel. The Director answered him in a memorandum of 22 November 1994 that according to a technical assessment by the classification section of the Bureau of Personnel the duties of post 67 which the complainant had been performing warranted only grade G.5; so there was no question of letting her have the allowance at any higher grade.

4. The Assistant Director-General sent another memorandum on 10 February 1995 and the Director of Personnel answered on 3 March that she would not change her decision. On 19 May the complainant wrote a letter to the Director-General asking him to intercede. On 7 September the acting Director-General answered that she was not to get the allowance after 1 July 1993. On 27 October 1995 she filed a notice of appeal with the Appeals Board and on 5 February 1996 her detailed statement of appeal. In its report of 5 July 1996 the Board recommended rejection. By a decision of 4 October 1996 the Director-General endorsed that recommendation, and that is the decision impugned.

5. The Organization submits that the complaint is irreceivable on the grounds that the complainant failed to comply with the rules on internal appeal and in particular with the time-limits for appeal to the Director-General and in the internal appeal proceedings.

6. According to Article VII, paragraph 1, of the Tribunal's Statute, a complaint "shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations". So where the staff regulations lay down a procedure for internal appeal it must be duly followed: there must be compliance not only with the set time limits but also with any rules of procedure in the regulations or implementing rules.

7. The Staff Regulations and Staff Rules of UNESCO lay down an internal appeal procedure, and paragraphs 7(a) and (c) and 10 of the Statutes of the Appeals Board go into the particulars. Thus 7(a) reads:

> "A staff member who wishes to contest any administrative decision or disciplinary action shall first protest against it in writing. The protest shall be addressed to the Director-General through the Director of the Bureau of Personnel, within a period of one month of the date of receipt of the decision or of the action contested by the staff member if he is stationed at Headquarters ..."

In support of its objection to receivability the Organization points out, first, that the complainant failed to address a "protest" to the Director-General through the Director of the Bureau of Personnel but merely sent him her letter of 19 May 1995, which was no "protest" within the meaning of 7(a); and, secondly, that it was out of time anyway.

8. The first argument fails. She duly addressed her letter of 19 May 1995 to the Director-General in the form of a protest within the meaning of 7(a). Although she sent it to him directly and not through the Director of the Bureau of Personnel, Staff Rule 101.1 confers on a staff member the right of "access to the Director-General, normally through established supervisory channels, but exceptionally and for sufficient reason, directly". This was just such an exceptional case. On 9 September 1994 the complainant had addressed an appeal to the Director of the Bureau of Personnel who, instead of forwarding it to the Director-General, passed it on to the Assistant Director-General for External Relations. The Assistant Director-General interceded twice on her behalf, but to no avail. So she was free to conclude that in the circumstances she had no choice but to go directly to the Director-

General. Indeed the Director-General did not demur. As for her letter of 19 May 1995, it is hardly arguable that its purpose was to protest against the decision notified in September 1994 to stop paying her the allowance.

9. The defendant's second argument is that she missed the time limit of one month in paragraph 7(a) for addressing her protest to the Director-General. Since the decision to stop the allowance was notified on 2 September 1994 the deadline was long past by 19 May 1995, when she made her protest. The argument is unanswerable. It is true that she did begin with an appeal of 9 September 1994 to the Director of the Bureau of Personnel, who was supposed to forward it to the Director-General: see Judgment 1259 (*in re* Camara) under 4. And the fact that the Director forwarded it instead to the Assistant Director-General for External Relations might conceivably have had the effect of suspending the time-limit. But the Assistant Director-General wrote his memorandum of 10 February 1995 and the Director of Personnel took her decision on 3 March 1995; so the time limit started again to run at the latter date. Even on that assumption the complainant's appeal of 19 May 1995 to the Director-General was too late.

10. The defendant further argues that the complainant failed to supply her detailed appeal within the time limit in paragraph 10 of the Appeals Board's Statutes, i.e. "within one month of the notice of appeal"; she did not supply it until 5 February 1996. She explains that the secretary of the Appeals Board asked her not to enter her detailed appeal before getting acknowledgement of receipt of the notice, and she did not get such acknowledgement until 31 January 1996. That is borne out by the secretary's letter of 9 January 1996, which says: "... your detailed appeal must reach me by ... 9 February 1996". The Board itself did not take the view that the complainant had been late in filing her detailed appeal. The Organization's plea that the complainant failed to abide by paragraph 10 is therefore not upheld.

11. Yet the conclusion is that the protest against the decision of 2 September 1994 was outside the time limit in paragraph 7(a). So the complaint is irreceivable, the internal remedies not having been exhausted.

DECISION

For the above reasons,

The complaint is dismissed.

DISSENTING OPINION BY MR. JEAN-FRANCOIS EGLI

I endorse the decision, but on other grounds.

I have difficulty with the conclusion in 6 above, that the internal remedies were not exhausted as Article VII(1) of the Tribunal's Statutes requires. It is true, as the judgment explains, that the complainant missed the time limits. But her case may be distinguished from earlier ones in which the Tribunal held that the internal remedies had not been exhausted: see Judgments 995 (*in re* Agbo); 1132 (*in re* Bakker No. 2); 1140 (*in re* Rosen); and 1181 (*in re* el Ghabbach No. 3). Here the decision-making authorities of UNESCO did not declare the internal appeals time-barred and therefore irreceivable but rejected them on the merits. In its report of 5 July 1996 the Appeals Board did not rule on the administration's plea that the appeal was out of time but recommended rejection on the merits. And in his decision of 4 October 1996 the Director-General endorsed that recommendation. He did so after seeing a further report made in August 1996 by the head of the classification section of the Bureau of Personnel, and so had all the material evidence at his disposal for deciding on the matter. It is indeed scarcely arguable that as the executive head of the Organization the Director-General was competent to determine whether the staff member had been unfairly treated. Where the system of appeal requires that remedies available in law before some other body be first exhausted, the purpose is to relieve the higher authority of going into the merits of a dispute which could have been put to the lower authority first but has not been and to respect the competence of the lower authority. The requirement is met when the lower authority has gone into the merits even if according to its own rules it was wrong to do so. Any other approach would prove needlessly troublesome to the would-be appellant. Here the Organization pleads failure to exhaust the internal remedies on the grounds that its acting Director-General and then the Director-General ought to have declared the appeals irreceivable. But since its shift in attitude is prejudicial to the other party it is estopped from so pleading: *venire non licet contra factum proprium*.

In any event the complaint is devoid of merit. What the complainant is objecting to is the grading of the duties of post 67 that she was carrying out. According to the case law such grading may be made only by those whose training and experience qualify them for the exercise. The Tribunal will not substitute its own assessment and may exercise only a limited power of review in the matter: see Judgment 591 (*in re* García).

The classification section of the Bureau of Personnel graded the duties that the complainant was performing in line with the relevant grading standards. A fuller assessment which the head of the section had made for the Director-General in August 1996 came to the same conclusion. And the complainant offers no plea to warrant setting the assessment aside.

There is no strict rule as to whether a particular duty belongs to the Professional or to the General Service category. That too is a matter within the discretion of the grading officers, and so is their assessment: see Judgment 606 (*in re* Polacchi). The evidence that the complainant is relying on does not suggest that there was any fatal flaw in the impugned decision.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

MELLA CARROLL E. RAZAFINDRALAMBO EGLI

A.B. GARDNER

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-THIRD SESSION

***In re* van der Laan (Nos. 1 and 2)** **Judgment 1654**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Hijlke van der Laan against the European Patent Organisation (EPO) on 11 January 1996 and corrected on 20 March, the EPO's reply of 10 June, the complainant's rejoinder of 26 August and the Organisation's surrejoinder of 30 September 1996;

Considering the second complaint filed by Mr. van der Laan against the EPO on 26 August 1996, the EPO's reply of 31 October 1996, the complainant's rejoinder of 20 January 1997 and the Organisation's surrejoinder of 27 February 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the cases and the pleadings may be summed up as follows:

A. The complainant, who is Dutch, joined the European Patent Office, the EPO's secretariat, in August 1980. At the material time he was Director of Personnel Administration at grade A5.

When the Principal Director of Personnel retired on 31 January 1992 the post was left vacant.

On 14 December 1994 the President of the EPO's Administrative Council announced to the staff that Mr. Ingo Kober would take over from Mr. Paul Braendli on 1 January 1996 as President of the Office.

On 21 December the Office announced an internal competition to fill the post of Principal Director of Personnel, which was graded A6. The closing date for applications was 18 January 1995. Four of the five Vice-Presidents of the Office objected on the grounds that the announcement was hasty and that the President-to-be and the future Vice-President in charge of Administration should be consulted.

On 18 January 1995 the complainant applied for the post. So did Mr. Volker Ahmann, the head of the President's office. On 18 January the chairman of the Promotion Board, and on 20 January the President of the Office, called upon the Vice-President in charge of Administration, who was the complainant's supervisor, to write by noon on 24 January a report on the complainant's performance in the last few years. In a minute of 24 January the Vice-President stated that his "comments had to be written under unacceptable pressure of time, which has adversely affected their quality". The complainant objected to some of his remarks and said he had not been given enough time in which to comment.

The Promotion Board saw Mr. Ahmann on 25 January and Mr. van der Laan on the 26th. In their report of the 27th the majority recommended both applicants but put Mr. Ahmann first. The same day the President appointed him as Principal Director of Personnel as from 1 February 1995. By a letter of 17 February the President informed the complainant that he had been unsuccessful. The complainant lodged an internal appeal on 3 March against that decision.

The Appeals Committee scheduled hearings for 6 September 1995 but its chairman adjourned them to 16 November because the complainant was ill. In a letter of 12 September 1995 to the chairman the President asked the Committee to report by 15 October 1995 on the grounds that the delay was damaging to the Principal Director of Personnel's position and so to the functioning of the Office itself; come what might, he would take his final decision after 16 October and waive the internal appeal if the Committee had not reported by then. By a letter of 16 October he told the complainant that he had withdrawn the case from the Committee and was rejecting the appeal. The Committee nonetheless submitted a report on 20 November 1995. It said that it was an independent body; citing Judgment 852 (*in re* Benze No. 5), it held that by withdrawing the case on the grounds that the Committee had failed to report by 15 October 1995 the President had acted *ultra vires* and in breach of the procedural safeguards that staff had against arbitrary decisions; and it therefore declined to give an opinion.

On 11 January 1996 the complainant filed his first complaint against the President's decision of 16 October 1995.

By a letter of 22 January 1996 the new President, Mr. Kober, told the complainant that he was withdrawing his predecessor's decision of

16 October 1995. The same day he referred the appeal again to the Committee and asked it to give the case priority. In its report of 12 April 1996 the Committee unanimously recommended allowing the appeal, reversing the appointment of Mr. Ahmann and ordering "a new selection/promotion procedure". It refrained from making a recommendation on the claim to damages on the grounds that the matter was before the Tribunal. The President accordingly took a new decision on 4 June 1996: he reversed the former President's decision of 27 January 1995 to appoint Mr. Ahmann; but he at once reappointed Mr. Ahmann as Principal Director of Personnel and upheld any decision he had taken since 1 February 1995; and he promised that Mr. Ahmann would suffer no injury, that any reasonable costs incurred by the complainant would be met and that he should also get 5,000 German marks in moral damages. That is the decision the complainant is impugning in his second complaint.

B. In his first complaint Mr. van der Laan submits that the President's decision of 16 October 1995 was unlawful because the process of selection was a mere sham calculated solely to have the head of the President's office appointed to the vacancy. He has three pleas: breach of the rules on promotion, breach of due administrative process and abuse of authority. He alleges serious moral injury. Although the present President has reversed the impugned decision, he has neither cancelled the appointment of Mr. Ahmann nor ordered a new and proper procedure. The complainant therefore asks the Tribunal to quash the President's decision of 16 October 1995, order the resumption of the process for appointing the Principal Director of Personnel and distribution of the text of the judgment to all the Office staff, and award him moral damages and costs.

In his second complaint he submits that the decision of 4 June 1996 is unlawful as well. Again he has three pleas. First, the President made a mistake of law, or at least drew obviously wrong conclusions from the evidence, by failing to order a new process of selection. Secondly, the Organisation's bad faith is plain from the merely formal reversal of Mr. Ahmann's appointment and from the reasons that the President offered for his decision. Thirdly, citing Judgment 431 (*in re* Rosescu), the complainant pleads misuse of authority: although the President did not act *ultra vires* he used his authority for an improper purpose. The amount of compensation granted by the impugned decision is not commensurate with the moral injury. The complainant seeks the quashing of that decision and maintains his other claims.

C. In its replies the Organisation asks the Tribunal to join the two complaints and, whatever the outcome, to dismiss the complainant's claim to costs on the grounds that he has run up needless expense by filing a second complaint instead of seeking a stay of proceedings pending submission of the Appeals Committee's report. It contends that the reversal of the impugned decision takes all substance from his first complaint. In answer to his plea about a mistake of law or the drawing of wrong conclusions it cites the Committee's view that the process of selection had been sound and the President right to endorse the Promotion Board's recommendation. It denies bad faith. The Committee saw abuse of authority only in the decision of 27 January 1995, which has been reversed, and the complainant adduces no evidence to back up his contention that the second one was likewise flawed. As to his claim to moral damages, both he and the other candidate were treated alike and his good name has not suffered for his failure to get the post. Save in quite exceptional circumstances the Tribunal holds that the quashing of the impugned decision affords redress enough. So indeed thought the Appeals Committee. As for the circulation of the text of the Tribunal's ruling, all judgments are made available to the staff.

D. In his rejoinders the complainant contends that an application for a stay of proceedings would have run counter to the Tribunal's own rules. On the merits he maintains that the reversal of the first decision was a mere formality. He questions the good faith of Mr. Ahmann, who, he says, was partly responsible for the hasty convening of the Promotion Board, and expresses surprise at the Organisation's wanting to shelter Mr. Ahmann from the adverse consequences of the reversal. He wants to see the judgment posted up on EPO premises or published in the EPO *Gazette*.

E. In its surrejoinders the Organisation denies that reversing the decision of 16 October 1995 was a token gesture: the purpose was to acknowledge the bias of the former President without casting doubt on the process of selection, which, as the Appeals Committee had held, was proper. Though Mr. Ahmann did play a part in issuing the notice of the vacancy, he was just discharging his own duty, which was to see that the Organisation followed the right procedure. By ensuring that the reversal of his appointment caused him no injury the EPO was acting on the case law, which says that someone who accepts an appointment in good faith should suffer no material injury on account of any flaw in the decision. The Organisation has no reason to give the judgment publicity, having given none to the complainant's application for the post or to his failure to get it.

CONSIDERATIONS

The material facts

1. The complainant joined the staff of the EPO in Munich in August 1980 at grade A3. On 1 January 1988 the Organisation promoted him to grade A5 as Director of Personnel Administration.

2. The post of Principal Director of Personnel fell vacant on 31 January 1992, but the incumbent continued to serve "on a contractual basis" — so said the President of the Office in a communiqué of 14 January 1992 — so as to obviate "changes in the management of Principal Directorate Personnel". In June 1994 the EPO commissioned a firm of consultants to carry out a review of the Personnel Directorate. It reported towards the end of the year. On 21 December 1994 the EPO announced a competition (PROM M/55) for the post of Principal Director of Personnel, setting the closing date for applications at 18 January 1995. On 22 December 1994 the President of the Office told the five Vice-Presidents that he had appointed the Principal Director of Administration to chair the Promotion Board.

3. On 18 January 1995 the complainant applied for the post. The only other candidate short-listed with him was Mr. Ahmann, the head of the President's own office. There was a third candidate whom the Board did not endorse.

4. On 20 January 1995 the chairman of the Promotion Board told the complainant that it was to meet on 25 January and called him for interview. At his request the interview was held over until the 26th. On the 27th, after a further meeting, the Board made a majority recommendation putting Mr. Ahmann first. On the same day the President endorsed that recommendation and appointed Mr. Ahmann.

5. On 17 February 1995 the President told the complainant that he had been unsuccessful. In a minute of 3 March the complainant asked the President to review his decision or, failing that, to treat his minute as an internal appeal. The President referred the case to the Appeals Committee. On 10 April the head of the Legal Service submitted the Administration's brief to the Committtee. On 7 September 1995 the chairman of the Committee told the complainant that it would hear him on 16 November. But by a memorandum of 12 September the President asked the Committee to report by 15 October and to rule on nothing but the written evidence should it be unable to hold hearings in time. Its chairman asked the complainant to comment and he answered that he wanted hearings. On 16

October, however, the President sent the complainant a letter to say that he had decided to remove the case from the Committee and, deeming the internal remedies to be exhausted, to reject his appeal.

6. On 24 October 1995 the President wrote to the chairman of the Appeals Committee to express surprise at learning that the Committee would still be hearing the complainant on 16 November and to explain that any hearings and any report by the Committee would be null and void. The Committee nevertheless met on 16 November and under cover of a note of 20 November submitted its report to the President. It said that, since it was unable to perform its task properly and since there had been many breaches of due process, it was declining to give an opinion on the merits or to make a recommendation.

7. In a minute of 15 December 1995 the President took the Committee to task for entertaining the case despite his telling it not to, and for ordering written submissions without his consent and in wilful abuse of its mandate. In a stoutly worded answer of 18 December its chairman asked the President to withdraw his note, which he described as "libellous", and said he would go to the Tribunal over the matter.

8. In his first complaint, filed on 11 January 1996, the complainant is challenging the decision of 16 October 1995.

9. By letters of 22 January 1996 Mr. Kober, who had taken over as President on 1 January, told the chairman of the Appeals Committee and the complainant that he was reversing the decision of 16 October 1995. He asked the chairman that priority be given to the case.

10. On 12 April 1996 the Committee unanimously recommended cancelling the appointment of Mr. Ahmann and resuming the process of selection. By a decision of 4 June 1996 the President endorsed the Committee's recommendation for cancelling the appointment but refused to resume the process of selection. Citing the majority recommendation by the Promotion Board, he appointed Mr. Ahmann as Principal Director of Personnel as from that date.

11. That is the decision impugned in the second complaint.

Joinder

12. The Organisation applies for joinder. Since both complaints arise out of disputes that raise the same issues of fact and of law they are joined to form the subject of a single judgment.

Receivability

13. The defendant pleads that the first complaint is irreceivable on the grounds that, the impugned decision of 16 October 1995 having been reversed, it discloses no cause of action.

14. The plea succeeds. That decision dismissed the complainant's internal appeal of 3 March 1995 against the decision by the then President to reject his application for the post of Principal Director of Personnel and to appoint Mr. Ahmann. The new President's decision of 4 June 1996 overruled that decision and thereby satisfied the complainant's claim to the quashing of it. Since it shows no cause of action his first complaint is irreceivable. As for the second complaint, its receivability, which the defendant does not dispute, is not in doubt.

The merits

15. The material issues are the appointment of Mr. Ahmann as Principal Director of Personnel and the rejection of the complainant's own candidature on the Promotion Board's recommendation.

16. How far will the Tribunal go in reviewing an appointment made on the strength of a notice of vacancy and a process of selection? There is a firm line of precedent on the subject. As has often been said, an appointment by an international organisation is a discretionary decision. Being subject to limited review, it may be set aside only if it shows some fatal flaw. Breach of a rule of form or of procedure and a mistake of law or of fact are examples of such flaws. But the Tribunal will be especially wary in such cases: it will not replace the organisation's rating of the candidates with its own. See Judgments 1077 (*in re* Barahona) under 4, and 1549 (*in re* López-Cotarelo), under 9.

17. To challenge the lawfulness of Mr. Ahmann's appointment the complainant has three pleas: (1) a mistake of law or at least the drawing of wrong conclusions from the evidence; (2) breach of good faith; and (3) blatant abuse of authority.

18. Under the first head he objects to the new President's reversing the decision of 16 October 1995 only to take the very same decision himself and appoint Mr. Ahmann and refusing the new process of selection that the Appeals Committee had recommended in its report of 12 April 1996. In support of that recommendation the Committee said that, though the procedure followed by the Promotion Board was "in accordance with the statutory requirements", it should be "set aside" because its purpose had

been the appointment of Mr. Ahmann and because the President had not been impartial.

19. The plea fails. In support of its conclusion that the sole purpose of the procedure was to appoint Mr. Ahmann the Committee cites several circumstances. Foremost are the haste in announcing the vacancy and in filling the post, the failure to consult the Vice-Presidents, and the exclusion of external applicants and of internal ones at grade A6, only grade A5 employees being allowed to apply. But those circumstances are all prior to the date of referral to the Promotion Board and cannot in any way affect the lawfulness of the actual process of selection. The Appeals Committee itself implied that there had been nothing wrong with the membership of the Promotion Board, the choice of its chairman being quite in order, nor with the procedure it followed, nor with its report. The Committee's conclusion was that the Board had been "successful in this case in avoiding any of the mistakes which would have nullified the procedure". So the President acted correctly in rejecting the Committee's recommendation for a new process: such process would have done nothing to purge the flaw in the previous President's decision, namely his lack of impartiality. In acting as he did the new President made no mistake of law and, contrary to what the complainant contends, the conclusions he came to on the evidence were not wrong.

20. Nor does the Tribunal see in the impugned decision any breach of good faith or abuse of authority. The complainant may have been sorry to find that the quashing of the decision of 16 October 1995 to confirm the one of 27 January 1995 had no effect because Mr. Ahmann was at the same time reappointed. Yet the appointment was sound in law: it followed a process of selection which was correct. The legal safeguards that any employee may expect were observed. And the complainant has shown no abuse of authority. The President acted *intra vires* and for the sole purpose of filling the vacancy when he picked the candidate whom the Promotion Board had, quite properly, put first.

21. The upshot is that the complainant's claim to the quashing of the impugned decision cannot succeed and that his claims to damages must fail too.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

WILLIAM DOUGLAS E. RAZAFINDRALAMBO JULIO BARBERIS

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-THIRD SESSION

***In re* Lacroix (No. 2)** **Judgment 1655**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs. Marianne Lacroix against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 10 May 1996, Eurocontrol's reply of 14 August, the complainant's rejoinder of 14 October 1996 and the Organisation's surrejoinder of 17 January 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Belgian who was born in 1949, joined the staff of Eurocontrol in 1972. At the material time she was a second-category clerk at grade C3 in the Central Route Charges Office in Brussels.

In October 1993 she hurt her leg in a fall in a swimming pool in Italy. Having provided medical certificates saying that she was unfit for work, she was put on sick leave. In August and again in November 1994 the Organisation's medical adviser examined her. After the second examination he agreed with her own doctor that she should go back to work on 3 January 1995. On 9 January she again failed to report for work on the grounds that she was suffering from "serious neuro-psychiatric disorders". The medical adviser examined her on 24 January and, notwithstanding the medical certificates she had produced, declared her fit to go back to work on 6 February 1995. She did not do so. On the 28 March the medical adviser saw her again and said that she was "fit for sedentary work". By a letter of 27 April the Director of Personnel ordered her to return to work at once and said that any further absence would be treated as unauthorised and any further application she made for sick leave would have to be backed up by a detailed medical report to the medical adviser.

The complainant supplied a certificate from her own doctor for the period from 1 to 31 May 1995. The medical adviser confirmed his earlier opinion, however, and the Director of Personnel told her in a letter of 15 May that her absence was unauthorised and would be docked from her leave entitlements and then, if need be, from her pay. At Eurocontrol's instructions she underwent a psychiatric examination on 17 June and an orthopaedic one on 3 July. The two specialists said that she was fit for work. By a letter of 13 July the Director of Personnel told her that since her leave entitlements had been exhausted by 30 June she would no longer be paid as from 1 July. She then saw a psychiatrist, who declared her unfit for work.

In a memorandum of 11 October 1995 she filed a "complaint" with the Director General against the Director of Personnel's "decisions" of 15 May and 13 July. She also asked for the setting up of the Invalidity Committee provided for in Article 59(3) of the Staff Regulations and for the immediate payment of the pay withheld. She nevertheless went back to work on 1 December 1995, though she said she was not withdrawing her appeal.

In a report of 7 December the Invalidity Committee said that she was fit for work but recommended transferring her to another unit. It took the view that "she had not been suffering from total permanent incapacity during the period in question" but had been suffering from "intermittent incapacity in that period", which it later set at 34 per cent of the time. In a letter of 28 February 1996 the personnel department, by then known as the Human Resources Directorate, told the complainant that on the Committee's recommendation she would be paid 72,200 Belgian francs for the period from July to November 1995. But in a memorandum of 6 March 1996 the head of the Remuneration Section revised the reckoning so that the amount she got in the event was only 18,904 francs.

On 30 January 1996 the Joint Committee for Disputes held that her appeal was receivable and sound. In a letter of 13 June 1996 the Director of Human Resources sent her the Committee's report but rejected her appeal on the Director General's behalf.

B. The complainant submits that the Organisation was in breach of Article 59(3) of the Staff Regulations in failing to convene the Invalidity Committee as soon as she had produced medical certificates with which the medical adviser disagreed. The Director of Personnel's "decisions" of

15 May 13 July 1995 were, in her view, improper because they were taken before the Invalidity Committee had been consulted. Moreover, there being no mention of any delegation by the Director General as the "appointing authority", the Director of Personnel had no competence to take any such "decisions".

As for the Invalidity Committee's report, it held good only for the future and the Agency therefore committed a mistake of law in relying on that report in support of its earlier decisions.

Lastly, by failing in its duty of care towards her, Eurocontrol caused her serious financial prejudice.

She seeks the quashing of the "decisions" of 15 May and 13 July 1995; the payment of the sums withheld, plus interest to be reckoned at the rate of 8 per cent a year; and an award of 500,000 Belgian francs in damages. She claims costs.

C. In its reply the defendant Organisation contends that the complaint is irreceivable on the grounds that the complainant did not lodge until 11 October her appeal against the decision of 15 May 1995. She thereby missed the time-limit of three months in Article 92(2) of the Staff Regulations. The letter of 13 July 1995 merely confirmed the decision of 15 May, which declared her absence to be unauthorised and stated the consequences.

Eurocontrol called the Invalidity Committee as soon as the complainant asked it to do so. The Committee was quite able to give an opinion about her fitness for work during the whole of the period of her absence since two of its members had kept a constant watch on the state of her health in that period and it had the opinions of three other doctors. The Director of Personnel received authority from the Director General to take the decisions in question. The fact that the text of the decisions do not mention such delegation does not rob them of effect in law or cast doubt on the actual delegation. The Organisation fulfilled its duty of care towards the complainant since on the strength of the Invalidity Committee's report it reckoned the pay due to her, agreed to transfer her to another unit and even proposed on compassionate grounds to pay her 390,000 Belgian francs, a generous offer which she turned down.

The Organisation asks the Tribunal to declare the complaint irreceivable and, failing that, devoid of merit and to order the complainant to bear the costs in full.

D. In her rejoinder the complainant submits that the letter of 15 May 1995 was a statement of intent and not a decision. In any event there were repeated decisions to withhold her pay, and each of them set off a new time limit of three months for appeal. Even supposing that the Tribunal upholds the defendant's objections to receivability, her appeal may be regarded as out of time only as to her leave entitlements.

She submits that the medical adviser took account only of her orthopaedic disorders in 1995. So much is plain from his recommending that she perform "sedentary work" at a time when her psychological disorders prevailed. The opinions which he expressed before the psychiatrist appointed by Eurocontrol examined her on 17 June 1995 were merely tentative; so the Agency was not free to rely on them to declare her fit for work. Moreover, it was at fault in declining to acknowledge the existence of a dispute long before she made her appeal of 11 October 1995. Even if the Director of Personnel did have delegated authority his decisions suffered from a procedural flaw since they bore no mention of the delegation, as the text conferring authority on him required. Lastly, she says that the Organisation has failed to exercise its duty of care: at a time when she was penniless it let the proceedings drag on, in the end it paid her only a derisory amount, and another staff member made rude remarks about her private life.

E. In its surrejoinder the defendant says that the medical adviser's views related to all the disorders that the complainant was suffering from, were not tentative and therefore afforded proper grounds for the Director of Personnel's decisions. It points out that the administrative action taken on the strength of his findings were not made retroactive and that the Invalidity Committee's recommendations were made retroactive only insofar as they were to the complainant's benefit.

CONSIDERATIONS

1. Having suffered injury in 1993, the complainant was put on sick leave and by 27 April 1995 had had a total of 703½ days' such leave. By a letter of that date the Director of Personnel ordered her to go back to work at once with the Central Route Charges Office. He said that any further absence would be treated as unauthorised and that any further application she made for sick leave would have to be backed up by a detailed medical report.

2. Her own doctor, Dr. Bernard, gave her a certificate, accompanied by a report, saying that she was not fit to work from 1 to 31 May 1995. On 15 May the Director of Personnel told her that the medical adviser of the Organisation would not allow her that sick leave; so any days of absence from 1 May would be docked from her annual leave and, if need be, from her pay.

3. By a letter of 13 July 1995 the Director of Personnel told her that her entitlements to leave had been exhausted by 30 June and that her further absences would be docked from pay, which she would not get from 1 July. On 19 September 1995 the same Director, now called Director of Human Resources, again ordered her to go back to work and confirmed that since her leave was unauthorised she had not been paid since 1 July.

4. On 11 October 1995 she filed a complaint with the Director General seeking the reversal of the Director's decisions of 15 May and 13 July 1995, the immediate payment of the sums withheld and the convening of the Invalidity Committee.

5. By a letter of 30 October the Director of Human Resources told her that the Invalidity Committee had been set up and that she should name a doctor to sit on it. She did so. In its report of 7 December 1995 the Committee said that during the period at issue she had not been suffering from total permanent disability and it set at 34 per cent of the time her actual disability, which it found had been merely intermittent.

6. The complainant went back to work on 1 December 1995.

7. At a meeting on 14 December 1995 the Joint Committee for Disputes took up her appeal of 11 October. In its report of 30 January 1996 it said that the appeal was receivable; expressed "doubt as to whether the Director of Human Resources had had power to take the challenged decisions"; and concluded that the Agency had "failed to comply with the provisions of the Staff Regulations in force" and to "discharge the duty of care that any employer owes someone who has been ill for a long time".

8. By a letter of 13 June 1996, i.e. after the filing of this complaint, the Director of Human Resources told the complainant on the Director General's behalf that her appeal of 11 October 1995 could not "be allowed".

Receivability

9. The Tribunal will first take up the defendant's objections to receivability. Eurocontrol argues that the only challengeable decision is the one of 15 May 1995 because the decision of 13 July 1995 merely confirmed

it and that the appeal of 11 October 1995 was out of time because the complainant filed it after the expiry of the time limit of three months in Article 92(2) of the Staff Regulations.

10. The plea fails. The defendant acted on the appeal of 11 October 1995 by convening the Invalidity Committee and the Joint Committee for Disputes and by taking the final decision of 13 June 1996. The attitude it thereby adopted towards the appeal estops it from now objecting to the receivability of the complaint. The complaint is therefore receivable.

The convening of the Invalidity Committee

11. The rules on the grant of sick leave are in Articles 59 and 60 of the Staff Regulations. The staff member must ordinarily tell the Organisation as soon as he can that he is unfit for work and must supply a medical certificate by the fourth day of absence. He "may be required to undergo a medical examination" if the organisation so decides. Article 59 sets out the two contingencies in which there may be referral to the Invalidity Committee. First, the Director General may refer to the Committee the case of a staff member "whose sick leave totals more than twelve months in any period of three years". Secondly, there may be referral to the Committee in the event of dispute. Article 60 says that "any unauthorized absence which is duly established shall be deducted from the annual leave" and, if such leave is exhausted, against pay.

12. Did the Organisation comply with the rules in this case? It appears on the evidence that during the period at issue the complainant was seen by psychiatrists and orthopaedists. They were not of one mind. On one side were Dr. Bernard, Dr. Pirotte, a neuro-psychiatrist, and Dr. Defleur, a psychiatrist; on the other, Dr. Vermeiren, the Organisation's own medical adviser, Dr. Castro, a psychiatrist, and Dr. Opdecam, an orthopaedist. A difference of opinion first arose when Dr. Bernard gave the complainant a sick leave certificate for May 1995 and Dr. Vermeiren refused to endorse it. The Joint Committee for Disputes, meeting on 14 December 1995, also found later disagreement between Dr. Defleur, who thought her "unfit", and Dr. Vermeiren, who declared her "not disabled".

13. On the strength of the foregoing the complainant maintains that from 15 May 1995 there was disagreement or dispute between the parties about her fitness for work. The defendant contends that at that time there was no disagreement yet and that dispute arose only when she challenged Dr. Castro's and Dr. Opdecam's findings.

14. The defendant's plea cannot be sustained. It is indeed hard to see why the complainant should have had to express her opinion more than once. The conclusion is that there was dispute between the parties by 15 May 1995 as to whether the complainant was fit to go back to work.

15. What attitude, then, ought the defendant to have taken as to that medical dispute? The complainant argues from Article 59(3) that it ought to have convened the Invalidity Committee forthwith. The Organisation retorts with two pleas. In its reply to the complaint it says that since she failed to challenge Dr. Castro's and Dr. Opdecam's findings there was no need to convene the Committee; in the Organisation's submission there was no dispute. In the same brief it further argues that it had no duty to convene the Committee on the grounds that:

> "It was the complainant who was to blame for the alleged delay in convening the Invalidity Committee since she took until 11 October 1995 to file her internal appeal and apply for the convening of that Committee."

16. The Tribunal has dismissed the first of those pleas in 14 above. As for the second, it explained in 11 above the two contingencies in which Article 59 provides for the convening of the Committee. In the first contingency the Director General "may" convene the Committee; so he merely has the option, and the exercise of his authority is not subject to review by the Tribunal. In the second contingency, which is the one in point here, the Staff Regulations say that "Cases in dispute shall be referred to the Invalidity Committee for an opinion". That is an obligation, and it is one that falls on the Director General. So it appears from Article 59 that in the event of dispute between the Organisation and the staff member about sick leave the Director General has the duty of convening the Committee so that he may have its opinion and of doing so, in a reasonable time. For that purpose he does not have to await an application from the staff member, who has only the right, not the duty, to ask him to convene the Committee.

17. The conclusion is that after dispute first arose between Organisation and complainant the Director General was bound to convene the Committee within a reasonable time. He took too long to do so. There being no need to entertain the complainant's objection that the Director of Human Resources acted *ultra vires*, the Tribunal holds that the complainant is right in maintaining that the procedure followed by the Director was improper.

The complainant's absences

18. The belated convening of the Invalidity Committee has no bearing, however, on the question as to whether the complainant's absences were authorised or not. If she was fit to go back to work her absences were unauthorised; only if she was unfit were they warranted.

19. The Committee took the matter up when it met on 7 December 1995. Its members were Dr. Bernard, Dr. Vermeiren and Dr. Meuris, the third being co-opted by the first two. They were unanimous that in the period at issue the complainant had not been wholly unfit for work and they estimated at 34 per cent of the time her incapacity, which was only intermittent. In other words, she had been fit for work 66 per cent of the time throughout that period.

20. Eurocontrol endorsed the Committee's findings in a letter which the Human Resources Directorate wrote to the complainant on 28 February 1996. She objects to the findings on the grounds that on 7 December 1995, when the Committee met, it did not have at its disposal enough medical data to enable it to give a proper opinion on the state of her health during the period in question.

21. That argument is unsound. Dr. Bernard was her doctor throughout and, as is plain from the evidence, thoroughly familiar with the state of her health; Dr. Vermeiren, the Organisation's medical adviser, knew her case well; and the Committee had her medical records, which included the findings of the examinations. The conclusion is that the Committee had enough medical data to enable it to express a view on the state of her health at the material time.

22. The defendant reckoned the pay due to her for the period from July to November 1995 and paid the sum due into her account.

The injury sustained

23. The complainant claims the payment of "500,000 Belgian francs in damages for the financial and moral injury attributable to Eurocontrol's unlawful decisions" and of interest to be reckoned at the rate of 8 per cent per year on the sums withheld. But she has merely made a general list of the forms of injury she says she has sustained without affording any particulars or proof.

24. For compassionate reasons and *ex gratia* the defendant has offered her 390,000 Belgian francs in compensation, an amount it sees as generous

"inasmuch as she has failed to put any figure on the injury or to offer properly circumstantial and specific proof thereof".

25. The complainant says in her rejoinder that she would have been "willing to accept the Organisation's offer" but in the end turned it down because someone in the Human Resources Directorate made rude remarks about her management of her private life.

26. The defendant says in its surrejoinder that, despite two meetings with its social welfare officer and several reminders on the telephone, the complainant has never given any idea of the injury she has sustained. Although Eurocontrol's decisions of 15 May and 13 July 1995 and the delay in convening the Invalidity Committee did cause her injury, she has never adduced any evidence of it. The Organisation's *ex gratia* offer of 390,000 Belgian francs is an attempt at fair assessment that the Tribunal sees no reason to question.

27. The complainant is entitled to an award of costs. The amount is set at 25,000 Belgian francs.

DECISION

For the above reasons,

1. The Organisation, which shall bear the adverse consequences of the belated convening of the Invalidity Committee, shall pay the complainant 390,000 Belgian francs.
2. It shall pay her 25,000 Belgian francs in costs.
3. Her other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

WILLIAM DOUGLAS **MICHEL GENTOT** **JULIO BARBERIS**

A.B. GARDNER

EIGHTY-THIRD SESSION

In re **Visanji** **Judgment 1656**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Marcia Visanji against the European Molecular Biology Laboratory (EMBL) on 18 October 1996, EMBL's reply of 8 January 1997, the complainant's rejoinder of 30 January and the Laboratory's surrejoinder of 7 February 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to allow the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who is British, joined the Laboratory's staff on 1 May 1990 under a three-year fixed-term appointment as a technical assistant at grade 5. She was assigned to its outstation at Hamburg and after a period of probation was promoted to grade 6. On 1 May 1993 EMBL granted her a 20-month extension of appointment, which it described in its offer as the "last possible extension" it would give her. She left on 31 December 1994, on the expiry of her appointment.

By a letter of 7 October 1993 the complainant's counsel told the management of the Hamburg outstation that his client might have contracted serious ailments from exposure to toxic chemical substances on the Laboratory's premises. He said that the safety precautions there were inadequate. He asked the management to improve them and to enable the complainant to consult a specialist of her own choosing. In letters of 15 December 1993 and 10 March 1994 she again complained to the head of the outstation about the inadequacy of the safety precautions. On 24 March 1994 her sister told the head of the outstation, among other things, that she was suffering from an eye infection due to a chemical substance, and asked him to take action.

In a memorandum of 11 April 1994 the Director General told the complainant that, having examined her various letters and grievances, he had decided to put her case to the Joint Advisory Appeals Board. On 28 July he told her counsel that he had convened the Invalidity Board in accordance with Article R.B.4 of the Staff Regulations and Article 13 of the Pension Scheme Rules applicable to Laboratory staff, and that the Laboratory had appointed a doctor to sit on the Invalidity Board. He asked counsel to name a doctor as soon as possible to represent her too on the Board. He added that the convening of the Board obviously took priority over the convening of the Joint Advisory Appeals Board.

The complainant thereupon named a doctor to represent her on the Invalidity Board.

In the ensuing months, however, she never acted on the Administration's repeated requests that she should say whether she wanted the Invalidity Board to continue the proceedings or not.

By a letter of 21 November 1996 she told the Director General that she had put her case to the Tribunal in the absence of any reply to her "letter of 26 August or that of 13 May 1996". The Administrative Director's answer of 24 November 1996 was that EMBL had no record of either letter.

B. The complainant impugns the implied rejection of claims that she says she made in the letter of 26 August 1996. She says that her health went into decline in the course of her appointment because of her working conditions. The Laboratory asked her to use chemical substances "that were considered too toxic to be handled by the rest of the staff". She says that she was exposed to substances that other staff had left on the premises. She complains of the treatment she received at the hands of the head of the Hamburg outstation. She accuses him of having isolated her from the other staff members by assigning her to a building where she was constantly on her own. He was guilty of harassment, intimidation and breach of medical privilege. He threatened not to renew her contract.

She says that belongings of hers were stolen from the premises and that another staff member physically assaulted her.

She submits that two months before the expiry of her first appointment, which was for three years, she got notice of renewal of her appointment for only twenty months. She accuses the Laboratory of destroying her reputation in the scientific community and frustrating her search for employment elsewhere.

She wants the Tribunal to award her (1) 70 per cent of her final salary "as long as necessary" in damages for the injury to her health; (2) 750,000 German marks in moral damages; (3) 2,154.64 marks to cover the costs of removal and "storage"; (4) 10,000 marks in unpaid indemnities; (5) 25,500 marks by way of unemployment benefit; and (6) 27,500 marks in costs. She claims the return of "private property".

C. EMBL contends that her complaint is irreceivable because of her failure to exhaust her internal remedies. For want of an express decision she is impugning the implied rejection of claims the Administration never received.

In any event her complaint is devoid of merit.

D. In her rejoinder the complainant disputes allegations of fact in the reply and enlarges on her pleas.

E. In its surrejoinder the Laboratory says that there is nothing in the rejoinder to suggest that her complaint is receivable.

CONSIDERATIONS

1. The EMBL recruited the complainant as a technical assistant on 1 May 1990 under a three-year fixed-term contract and extended it until 31 December 1994.

2. During that period the complainant stated many grievances, and they fall into two broad categories: the lack of proper safety measures, which she said had affected her health, and various acts of personal harassment. Details are set out under B above.

3. The relevant provisions of Section 6.1 of the EMBL Staff Regulations read:

> "R 6.1.03: Appeals shall be addressed in writing to the Director-General ...
>
> R 6.1.04: Appeals shall be lodged within thirty calendar days from the date of notification of the disputes decision ...
>
> When the Director-General does not take action within 60 calendar days in response to a written claim, the above-mentioned period shall run from the sixtieth day ...
>
> R 6.1.05: The Director-General shall judge the appeal. Before making his decision, he shall consult the Joint Advisory Appeals Board ..."

4. Article 13.1 of the Pension Scheme Rules applicable to Staff of the EMBL provides:

> "an invalidity pension shall be payable to a staff member who is under the age limit laid down in the Staff Regulations and who, at any time during the period in which pension rights are accruing to him, is recognized by the Invalidity Board ... to be suffering from permanent invalidity which totally prevents him from performing the duties attached to his employment in the Organization."

5. By a letter dated 11 April 1994 the Director-General told the complainant that, having considered her several letters and complaints, he had referred them to the Joint Advisory Appeals Board. By a letter dated 28 July 1994 he told her that he had convened the Invalidity Board, which, he said, "obviously takes priority over the convening of the Joint Advisory Appeals Board".

6. During the next fourteen months there was protracted and acrimonious correspondence between the complainant and the EMBL about the disclosure of information and medical reports to be put to the Invalidity Board. By a letter dated 16 October 1995 the Administrative Director told her that she was out of time because Article 13 of the Pension Scheme Rules required recognition of permanent invalidity by the Board "during the period in which pension rights are accruing"; but the Director gave her "a final chance" to submit, through the doctor she had nominated to the Board, a formal claim identifying her permanent invalidity. She took no further action.

7. One year later, on 18 October 1996, she filed this complaint claiming (a) compensation for damages to her health resulting from the breach of health and safety regulations, for breach of confidentiality and for defamation; (b) the return of her belongings; (c) the reimbursement of removal and storage expenses; (d) the payment of unpaid termination indemnities and unemployment benefits; and (e) costs. Pleading that the EMBL has not taken any express decision, she states that she notified her claims to it on 26 August 1996.

8. The complainant has not supplied a copy of those claims with her complaint and, even though the EMBL states in its reply that it never received them, has not supplied it with her rejoinder either. The only basis on which she invokes the Tribunal's jurisdiction is that the EMBL

has failed to take a decision upon her alleged claims of 26 August 1996. Even assuming that those claims were not by then time-barred, she has failed to establish that she did make them and that they related to the matters which form the subject of this complaint. Her complaint is therefore irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

Wm Douglas

WILLIAM DOUGLAS

MICHEL GENTOT

MARK FERNANDO

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-THIRD SESSION

In re Sethi (No. 3)

Judgment 1657

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Devendra Nath Sethi against the World Health Organization (WHO) on 16 September 1996 and corrected on 28 October 1996, the WHO's reply of 3 February 1997, the complainant's rejoinder of 14 February and the Organization's surrejoinder of 21 April 1997;

Considering Articles II, paragraph 5, and VII, paragraphs 1 and 3, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Several facts of relevance to this case appear under A in Judgment 1557 on Mr. Sethi's first complaint.

That judgment was delivered on 11 July 1996. On 2 August the WHO paid the complainant 3,000 United States dollars in moral damages and costs. On 22 August the procedure for review of the grading of his post was resumed. On 2 September the administrative services officer (ASO), his first-level supervisor, made detailed comments on the draft post description that the complainant had drafted. The personnel unit of the Regional Office for South East Asia (PER/SEARO) forwarded those comments to him on 5 September, inviting him to answer. On 16 September 1996 he wrote objections to his supervisor's comments and filed this complaint.

B. The complainant contends that the WHO failed to take a decision on his claim to regrading within sixty days of the delivery of Judgment 1557, though that was what Article VII(3) of the Tribunal's Statute required. He submits that the Organization's dilatory and "unconstitutional" tactics are proof of its long-standing hostility towards him. He pleads that Judgment 1557 did not take account of the injury he has sustained and that he has been discriminated against, other claims like his own having been promptly met.

He claims the immediate application of the procedure for the grading of his post, and substantial awards of damages and costs.

C. The WHO replies that it is executing Judgment 1557 with due diligence and in accordance with the applicable procedure. It explains that before forwarding to headquarters — as Judgment 1557 requires — a claim to the regrading of a post in a regional office, a new post description must be certified by the Regional Director and approved by the Regional Office.

Article VII(3) of the Statute does not, in its view, require it to execute a judgment within sixty days.

The complainant's new first-level supervisor, who needed time to learn the job before commenting on his performance, confirmed his predecessor's comments on 21 January 1997.

D. In his rejoinder the complainant argues that the delivery of Judgment 1557 is analogous to the making of a "claim", within the meaning of Article VII(3), by the Tribunal on his behalf. So the Organization was required to take a final decision on the regrading of his post within sixty days. It had no intention of executing the judgment in processing his claim to regrading. By a memorandum of 17 December 1996 his new supervisor gave almost full approval to his draft description of his post. The Organization's bad faith is plain from its ignoring that memorandum and making his supervisor write another. Lastly, he says he has lost confidence in the WHO's impartiality and asks that an independent expert review his post.

E. In its surrejoinder the Organization challenges the complainant's reading of Article VII(3). It acknowledges that its wish to have the views of his new supervisor and his own consent, though neither were required, did hold up the proceedings a little, but observes that he is himself partly to blame because he proved unhelpful.

CONSIDERATIONS

1. This complaint is a sequel to Judgment 1557 of 11 July 1996, which was about Mr. Sethi's first complaint and set out the main facts of the case.

2. Before 22 April 1993 the complainant had made several requests for the upgrading of his post from ND.8, a grade in the General Service category, to P.2/P.3, which is in the Professional category. In Judgment 1557 the Tribunal held that the rejection of those requests neither justified nor constituted denial of yet another request he had made on 22 April 1993, the reason being that that "was a new one, supported by new material and made after his supervisors had for the first time acknowledged that the description of his post needed revising".

3. According to WHO Manual paragraphs II.1.130 and II.1.200 that request should first have been processed by the regional personnel officer at the Regional Office for South East Asia, in New Delhi, in accordance with the regional procedures and then transmitted to the Personnel Division at headquarters in Geneva for decision. As those requirements had not been observed, the Tribunal quashed the Director-General's decision of 12 April 1995 to dismiss the complainant's appeal and directed the Organization to process anew his request of 22 April 1993 for the regrading of his post. It also awarded him moral damages and costs.

4. On 2 August 1996 the WHO paid the complainant the moral damages and costs.

5. By a memorandum dated 22 August 1996 the Personnel Division of the Regional Office sent the complainant's request of 22 April 1993 and the draft description of his post to his first-level supervisor, the administrative services officer (ASO). In that memorandum Personnel asked the ASO to review the draft in consultation with the complainant, who got a copy of it on 23 August. The ASO submitted his detailed observations in a memorandum of 2 September, of which the complainant was sent a copy on 5 September for observations: he was told that once they had been received further action would be taken to process his request.

6. On 16 September he replied to the memorandum of 5 September saying that he did not agree with his supervisor's comments because the post description that he had himself submitted was based on the duties and responsibilities he was actually performing. He asked that the evaluation of

the description of his post "by the authorized mechanism be carried out on the basis of [his] submission".

7. The same day — 16 September — he filed this complaint.

8. The complainant pleads that the date of Judgment 1557, 11 July 1996, must be taken as that of his claim and that, the WHO having failed to take a final decision within sixty days thereafter, he was free under Article VII(3) of the Tribunal's Statute to come directly to the Tribunal. He asks the Tribunal to "direct the Director-General of WHO to immediately undertake proceedings to review the classification of the post held by the complainant, through desk audit and other prescribed procedures, to reach a conclusion as objectively as possible" and to award him damages and costs.

9. The WHO's reply dated 3 February 1997 shows that not even then, six months after Judgment 1557, had the processing Of the case at the regional level been completed. In its surrejoinder the WHO stated that it would be by the end of May 1997.

Receivability

10. Judgment 1557 required the WHO to process the complainant's request for upgrading. That had to be done in keeping with the Manual, which required processing according to the regional procedures and then transmission to Personnel at headquarters for decision.

11. According to Staff Rule 1230.1.4 a staff member who alleges that the WHO post classification standards have not been properly applied to him is entitled to appeal. Rules 1230.2 and 1230.8.4 say that where the regional office does not have authority to apply those standards he must address such appeal to the headquarters Board of Appeal. According to 1230.8.1, he may appeal only when he has received written notice of a final decision. Rule 1230.8.2 provides that if a staff member assigned to a duty station other than headquarters has not received a final reply to his request within three months:

> "the request shall be deemed to have been rejected and such rejection shall be subject to appeal as if final action had been taken on it as in Rule 1230.8.1 ..."

Indeed Judgment 1557 shows that that is how the complainant came to lodge the internal appeal which gave rise to his first complaint.

12. So Personnel at headquarters had three months in which to take a decision on the complainant's request; failing an express decision within that period, refusal would have been implied. He was not entitled to infer refusal before three months had passed and even thereafter his remedy was to appeal to the headquarters Board.

13. Even though there has been unacceptable delay in the WHO's processing of the complainant's request, he has failed to exhaust his internal remedies under the Staff Regulations and Rules before filing this complaint and so to comply with the requirement of by Article VII(1) of the Statute.

14. Even if, as he contends, Article VII(3) were applicable, Personnel at headquarters could not have taken a decision on his request until it had been duly processed at the regional level and sent to headquarters; no fair decision would have been possible if his supervisor's observations had been sent without getting his response; and a reasonable time had therefore to be allowed for such processing at the regional level.

15. The complainant lodged his complaint just sixty-seven days after the publication of Judgment 1557. The eleven days which he took to submit his comments must be excluded in reckoning the period of sixty days stipulated in Article VII(3). So even if his own hypothesis were acceptable, he would have failed to satisfy Article VII(3).

16. The complaint is irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Michel Gentot, Vice-President of the Tribunal, Mr. Mark Fernando, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

MICHEL GENTOT

MARK FERNANDO

JULIO BARBERIS

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-THIRD SESSION

In re Vollering (No. 9)

Judgment 1658

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Mr. Johannes Petrus Geertruda Vollering against the European Patent Organisation (EPO) on 14 November 1995, the EPO's reply of 15 December 1995, the complainant's rejoinder of 29 March 1996 and the Organisation's letter of 26 April 1996 to the Registrar of the Tribunal saying that it did not wish to file a surrejoinder;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal and Article XII, paragraph 1, of its Annex;

Having examined the written submissions and decided not to order hearings, which neither party has applied for:

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The main issue in this case is the amount of the deductions that the EPO may make from the pay of staff on account of their participation in a strike. The Tribunal ruled on that issue in Judgments 1041 (*in re* Lammineur), 1333 (*in re* Franks No. 2 and Vollering No. 2) and 1612 (*in re* Cook No. 4). A second issue is the child allowance paid by the Government of the Netherlands, known as the *kinderbijslag*. Information on that allowance is given in Judgments 1296 (*in re* Cook), 1333 and 1567, on Mr. Vollering's eighth complaint.

On 8 December 1993 the complainant took part in a one-day strike at The Hague, where the EPO employed him as an examiner of patents. From an additional pay slip he got for the month of February 1994 he learnt that the Organisation had docked one-thirtieth of his basic salary and resident's and dependant's allowances from his pay for that month. The ordinary pay slip for the same month showed that another deduction had been made, in an amount of 303 guilders, because his wife was receiving the *kinderbijslag*.

In a letter of 25 May 1994 to the President of the European Patent Office, the secretariat of the EPO, he applied for the repayment of the sums deducted in February on account of his participation in the strike insofar as they related to the allowances on the grounds that "the Office considers these allowances to be social benefits". Alternatively, if the Organisation saw them "as a pro-rata payment", he asked it to stop making deductions from his EPO child allowance on account of the *kinderbijslag* and pay back to him the amounts corresponding to any deductions made on that account. On 7 July the Director of Staff Policy told him that the President had put his case to the Appeals Committee.

In its report of 4 July 1995 the Appeals Committee unanimously recommended rejecting his appeal as irreceivable on the grounds that the matter was *res judicata*. In a letter of 11 August 1995 the Director of Staff Policy told him that the President had endorsed the Committee's recommendation. That is the decision he is challenging.

On 21 February 1996 he wrote to the members of the Administrative Council of the EPO asking the Council to seek an advisory opinion on Judgment 1333 from the International Court of Justice in accordance with Article XII(1) of the Annex to the Tribunal's Statute. In a letter of 27 March the chairman of the Council answered that the conditions for referral to the Court were not met.

B. The complainant puts forward pleas which he and others offered in support of complaints on which some of the above-mentioned judgments ruled. He also cites records of the internal proceedings.

He comments on the Appeals Committee's report. Its view that it was unlawful to make deductions from his allowances on account of his participation in the strike disagrees with the Tribunal's; yet it felt bound by Judgments 1041 and 1333. Citing its conclusion that he himself may not seek an advisory opinion directly from the International Court of Justice, he contends that the Tribunal's Statute is discriminatory. He says that proceedings before the Tribunal are "no longer public", the only pleas made public being those that the Tribunal chooses to publish because it sees them as relevant. He says that its judgments are "arbitrary". The Committee overlooked the second aspect of his appeal.

He submits that the internal appeal on which his complaint rests is a new one.

He asks the Tribunal:

> "1. to postpone the decision of this complaint till [at least] after a decision has been taken by the Governing Body concerning the request to bring Judgement 1333 to the [International Court of Justice] for an Advisory Opinion;
>
> 2. to declare itself not neutral to give a judgement in this complaint because of the Tribunal's involvement (and especially of its members) in the Judgements 1041, 1296, 1297 and 1333;
>
> 3. to quash the decision of the EPO President, dated 11 August 1995;
>
> 4. to declare that EPO allowances constitute a form of social security in accordance with higher principles of law;
>
> 5. to order repayment of all sums of money deducted from the complainant's allowances because of strike action with an added interest of 10% p.a.;
>
> 6. to order the award of moral damages to the complainant of NLG 14000 [guilders] because of the illegal disciplinary sanction suffered by the complainant at the moment his social allowances were deducted following strike action;"

Alternatively he asks the Tribunal, "if the allowances are seen as a pro rata payment, instead of the redress of points 4-6 the redress of points 7-8", which read as follows:

> "7. to order the EPO to pay back all the deducted amounts from the complainant's remuneration because of the receival of "Kinderbijslag" by the complainant's wife with an added interest of 10% p.a.;
>
> 8. to order the EPO to pay a moral damage of NLG 10000 to the complainant because the EPO upholds the illusion that the dependants' allowance is of like nature as the "Kinderbijslag" while in judgement 1333 (re Franks and Vollering) it is judged to be a simple pro rata payment."

Lastly, he wants the Tribunal -

> "9. to condemn the EPO for the failure of the [Internal Appeals Committee] to show proper impartiality in the composition of the members of the IAC [of whom he names one] and to order compensation to the complainant of NLG 5000 for the moral damage suffered by this lack of impartiality of a part of the composition of the IAC;
>
> 10. to condemn the EPO for the failure of the Internal Appeals Committee (IAC) in making a true and neutral investigation and therefore the breach of due process of law and to order compensation to the complainant of NLG 10000 for the moral damage suffered by this;
>
> 11. to order the award of costs of NLG 40000 to the complainant."

C. The EPO replies that the complaint is irreceivable on the grounds that the impugned decision merely confirms, in line with precedent, the lawfulness of the deductions made. The issue is *res judicata*. Insofar as the complainant makes new claims, they are irreceivable because he has made no internal appeal.

In subsidiary argument on the merits the defendant contends that Article 65(1) b) of the Service Regulations, which grants authority to make deductions from pay, is to be applied to pay as defined in Article 64(2), i.e. to include the basic salary and, where appropriate, allowances and benefits.

The Organisation invites the Tribunal to declare that the complainant causes it injury by lodging complaints in defiance of *res judicata*.

D. In his rejoinder the complainant submits that the Tribunal's judgments have put staff and their families in a "legal and social vacuum". He replaces his claim (1) with an application for adjournment "till at least after a decision has been taken by the [Administrative Council] of the EPO concerning the request to bring Judgment 1333 to the [International Court of Justice] for an Advisory Opinion".

CONSIDERATIONS

1. On 8 December 1993 the complainant participated in a one-day strike of EPO staff stationed at The Hague. The Organisation deducted one-thirtieth of his total pay for February 1994 in accordance with Article 65(1) b) of the Service Regulations. His normal pay slip for that month showed the amounts of his basic salary, household allowance and dependant's allowance. From the last was deducted the sum of 303 guilders on account of the payment of the Dutch child allowance, or *kinderbijslag*, to his wife. An additional pay slip for February 1994, sent to him because of his participation in the strike, showed deductions from his basic salary and household allowance and another from the dependant's allowance.

2. In a letter of 25 May 1994 to the President of the European Patent Office the complainant lodged an internal appeal claiming repayment of the deductions shown in the additional pay slip from his allowances or else of the sum of 303 guilders deducted on account of the payment of *kinderbijslag* to his wife.

3. In its report of 4 July 1995 the Appeals Committee recommended rejecting the appeal as *res judicata*. The Director of Staff Policy did so on the President's behalf by a letter dated 11 August 1995. That is the decision impugned.

4. In his pleadings the complainant asks the Tribunal to adjourn the case until a decision has been taken by the Governing Body of the International Labour Office — which he replaces in his rejoinder with the Administrative Council of the EPO — on his application for referral of Judgment 1333 (*in re* Franks No.2 and Vollering No. 2) to the International Court of Justice for an advisory opinion. By a letter dated 19 November 1996 the Tribunal asked the Organisation what was the status of any application from the complainant to the Administrative Council for such referral. The Organisation replied on 26 November 1996 enclosing a copy of a letter that the chairman of its Council had written to the complainant on 27 March 1996 explaining that the conditions for such referral were not fulfilled: the Council was satisfied, said its chairman, that the Tribunal had been competent to hear the case and that there had been no fundamental fault in the procedure followed.

5. Since the complainant's application for referral to the Court has been refused the Tribunal will now take up the case.

6. That the Organisation may make deductions from remuneration in the event of a strike by its staff was declared in Judgments 1041 (*in re* Lammineur) and 1333. Remuneration includes allowances. The Tribunal has also ruled in Judgments 1296 (*in re* Cook) and 1297 (*in re* Theuns No. 3) that the *kinderbijslag* and the dependant's allowance that the Organisation pays are "of like nature". In Judgment 1567, on Mr. Vollering's eighth complaint, it rejected his contention that Judgment 1333 had overruled 1296 and 1297 and affirmed that the ruling in 1296 and 1297 about the nature of the *kinderbijslag* held good. The complainant's claim to repayment of all sums deducted from his allowances because of strike action, having been ruled on in 1333, is irreceivable because it is *res judicata*.

7. His alternative claim to repayment of the amounts deducted from his allowance on account of his wife's receipt of the *kinderbijslag* formed the subject of Judgment 1567. That judgment, which the Tribunal delivered on 30 January 1997 after the close of pleadings on this case, dismissed his eighth complaint. For the reasons it set out therein the Tribunal held that the Organisation was entitled to make a deduction from his dependant's allowance on account of payment of an allowance "of like nature" from another source, i.e. the *kinderbijslag*. So claim 7 fails.

8. The complainant asks the Tribunal to "declare itself not neutral to give a judgment in this complaint because of the Tribunal's involvement (and especially of its members) in the Judgements 1041, 1296, 1297 and

1333". That is not an acceptable claim. The Tribunal will entertain each case that comes before it, apply the material law in making its ruling and in particular take account of precedent so as to ensure consistency. It will apply Judgments 1041, 1296, 1297 and 1333 insofar as they are relevant. Besides, by lodging this complaint the complainant has acknowledged the Tribunal's competence to hear it. If he does not want the Tribunal to rule on his case, his remedy is to withdraw suit. He has not done so.

9. He has failed to substantiate his allegations about partiality in the composition of the Appeals Committee and its failure to make "a true and neutral investigation". Claims 9 and 10 therefore fail.

10. His claims 4, 6 and 8 are irreceivable for failure to exhaust the internal means of appeal.

11. Since there are no sustainable grounds for quashing the impugned decision, his subsidiary claim to costs must also fail.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

Wm Douglas

WILLIAM DOUGLAS

Mella Carroll

MELLA CARROLL

E. RAZAFINDRALAMBO

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner

A.B. GARDNER

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-THIRD SESSION

***In re* Aschenbrenner, Grand Kammer and Haeberli**

Judgment 1659

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Gerhard Aschenbrenner and by Mr. Heinz Haeberli against the European Free Trade Association (EFTA) on 12 February 1996 and corrected on 30 April;

Considering the complaint filed by Mrs. Nicole Grand Kammer against the Association on 14 February 1996 and corrected on 30 April;

Considering EFTA's replies of 14 August 1996, the complainants' rejoinders of 30 October and the Association's surrejoinders of 4 April 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written evidence and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Mr. Aschenbrenner, an Austrian who was born in 1941, joined the staff of EFTA in September 1971. In 1982 the Association granted him a permanent appointment. At the material time he held a grade P.4 post in the Legal Affairs Department. Mrs. Grand Kammer, who is Swiss and was born in 1944, joined the Association in September 1978 and got a permanent appointment in 1990. Her final grade was G.5, although she had a special post allowance corresponding to G.6, and she worked in the typing pool. Mr. Haeberli, who was born in 1938 and is also Swiss, joined EFTA in July 1967, got a permanent appointment in 1975 and was in charge of the Finance Section at grade P.3.

Meeting in Helsinki on 22 June 1994, the ministers representing the seven member States of the Association took note of the accession of Austria, Finland and Sweden to the European Union and of their consequent withdrawal from the Association as from 31 December 1994. The changes since made in the Association's structure are described in Judgment 1596 (*in re* Leicht and others) under 2 and 3. At a meeting on 12 December 1994 the Council of the Association instructed the Secretary-General to give notice of termination as from 30 June 1995 to holders of permanent appointments. On 13 and 14 December 1994 the Council set up a working group to make proposals for establishing a new secretariat.

By letters of 14 December 1994 the Secretary-General informed the complainants that, by reason of the Council's decision to "wind up" the secretariat and on the Council's instructions he was terminating their appointments as from 30 June 1995 under Staff Regulation 12.2(c).

In February 1995 the Council endorsed the working group's proposals. On 22 February the Association issued several notices of vacancy for the recruitment of staff under fixed-term appointments. Each of the complainants applied for one or more posts. On 17 May the Secretary-General told them that he could offer them no employment in the new secretariat.

On 29 June 1995 the complainants filed internal appeals with the Advisory Board of EFTA against termination. In letters of 14 November 1995 the Secretary-General told them that there had been failure to constitute the Board and that the material rules therefore allowed direct appeal to the Tribunal. Those are the impugned decisions.

B. The complainants contend that the secretariat was never "wound up". The only change that occurred after 30 June 1995 was that staff were laid off and some terms of service, such as the grant of permanent appointments, were struck from the Staff Regulations and Rules.

In their submission the termination of their appointment has no proper basis in law since it was in breach of Staff Regulation 12.2(b). That provision requires the Association, where posts are abolished or staff reduced, to grant priority for employment, on certain conditions, to holders of permanent appointments. So the dismissals are null and void.

The complainants plead abuse of the procedure on the grounds that by the time they were given notice of dismissal the decision had already been taken to keep the secretariat going. Yet it was the "winding-up" of the secretariat that the letters of 14 December 1994 gave as the grounds for dismissal. Although the secretariat was supposedly being wound up it started up the very next day under the same name and with the same legal personality and terms of reference. The purpose of the whole exercise was to dodge the safeguards granted to the staff and the precepts of international civil service law.

The complainants seek the quashing of the decisions terminating their appointments at 30 June 1995 and their reinstatement in EFTA under permanent appointments as from 1 July 1995 and in the Association's Pension Fund or, failing that, awards of damages for loss of employment up to the date of retirement. They seek costs.

C. The Association replies that the complaints are irreceivable on several grounds. In its submission the Secretary-General's final decisions were in the letters he wrote to the complainants on 14 December 1994, not in those of 14 November 1995, the ones they purport to be challenging in their complaints. Since the complaints were not filed until February 1996 they are out of time. Although the Staff Regulations and Rules set no time limit for appeal to the Advisory Board, the complainants took over six months to file internal appeals. That is not a reasonable time on any reading of the case law. The Regulations and Rules do not set any time limit that is greater than six months. In any event the complaints are time-barred under Article VII(3) of the Tribunal's Statute.

On the merits the Association contends that Regulation 12.2(b) does not apply. When the Council told the Secretary-General to give the complainants notice of dismissal the remaining member States had not yet decided to set up a new secretariat. So at the time there were no posts that the complainants could have been redeployed to. And though the defendant later duly published notices of vacancies in the new secretariat the complainants have not challenged the rejection of their applications for some of those posts.

The Association says that the complainants have produced privileged documents in breach of Regulation 5 and asks the Tribunal to strike out those items.

D. In their rejoinders the complainants reject the Association's objections to receivability. On the merits they submit that their posts were never abolished and that in any event the Association was not free to terminate their permanent appointments without carrying out the reduction-in-force procedure. The purported distinction between old and new secretariats is a mere fiction that has no legal force and does not warrant depriving permanent staff of their jobs and acquired rights. The complainants put at 5,000 Swiss francs each the amount they are claiming in costs.

E. In its surrejoinders the defendant points out that since all jobs with the old secretariat, including the complainants', were abolished, Regulation 12.2(b) was not applicable. There was nothing fictitious about closing down the secretariat on 30 June 1995: it was lawful for the remaining member States to decide, when three had gone, what shape and form the Association should take and what it should be doing.

CONSIDERATIONS

1. The complainants used to hold permanent appointments with the European Free Trade Association. The Secretary-General of the Association told them on 14 December 1994 that he had to terminate their appointments at 30 June 1995. Such was the outcome, he said, of a meeting of the Council of the Association. Several member States having left to join the European Union instead, the Council had decided at that meeting to "wind up" the secretariat, i.e. have it stop work on 30 June 1995. The member States had resolved — said the Secretary-General — to consider later the sort of services the Association would need from the secretariat after that date; but the decisions to end the complainants' appointments were "final".

2. In February 1995 the decision was taken to recruit staff for a smaller secretariat under fixed-term appointments. The complainants applied for the jobs that were on offer but to no avail: in letters of 17 May 1995 the Secretary-General told them that he was "unfortunately not in a position to offer [them] a post in the new EFTA Secretariat".

3. On 29 June 1995, the day before the dismissals were to take effect, the complainants appealed to the Advisory Board that hears individual disputes before appeal will lie to the Tribunal. They challenged the decisions and sought reinstatement or, failing that, damages.

4. On 14 November 1995 the Secretary-General answered that the delegations of the seven former and remaining member States of the Association had "failed to generate a consensus on the constitution of an Advisory Board" as provided for in the rules and that "Under these circumstances, Regulation 41 paragraph (b) ... in force prior to 1 July 1995

allows for an appeal to the ILO Tribunal, as the Advisory Board has failed to transmit to the Secretary-General its opinion or proposals for settlement within sixty days of the receipt" of the appeals.

5. The three complainants filed their complaints on 12 and 14 February 1996. The complaints are joined because the complainants are in like case in law, if not in fact.

6. The defendant pleads that the complaints are irreceivable.

7. Its first argument is that the complainants may not challenge before the Tribunal the decisions of 14 November 1995, which simply told them that they were free to appeal. The "final" decisions appealable under Regulation 41(b) are the dismissals dated 14 December 1994 and notified the next day.

8. The complainants are challenging, not the rejection of their applications for new jobs, but the refusal of their claims to reinstatement, and they are thereby challenging the lawfulness of the Secretary-General's decisions of 14 December 1994. Regulations 40 and 41 in force at the time must be read together: only after referral to the Advisory Committee may those decisions be treated as "final" and challenged in complaints before the Tribunal. Although they were described as "final" the complainants were not then free to go straight to the Tribunal; they had to appeal to the Advisory Board first.

9. The defendant pleads, secondly, that they ought to have acted in time: they did not go to the Board until 29 June 1995, six-and-a-half months after they had had notice of dismissal. The plea would no doubt succeed if the rules set a time limit for appeal, but they do not. It is perhaps a pity that the complainants tarried until the very eve of dismissal. But they did expressly reserve their rights when acknowledging receipt of notice of dismissal, and they were hoping until the last day for a satisfactory outcome. So it is hardly arguable that some time limit which was not even in the rules was running against them. They were therefore still free on 29 June 1995 to appeal to the Board against the decisions of 14 December 1994.

10. The Association's third plea is that, if they were still free to go to the Board, they ought to have inferred rejection after sixty days. They then had ninety days under Article VII(2) of the Tribunal's Statute in which to file complaints. Since two of them did not do so until 12 February 1996 and the third not until 14 February, or over 150 days after the notification of their appeals to the Board, they were out of time. The plea again fails.

Although there was no report from the Board within the sixty days, the reason was that it had never been set up. Actually it never was. As was held in Judgment 1596 (*in re* Leicht and others) of 30 January 1997, the time limit of ninety days began only at 16 November 1995: that was the date at which they received the Secretary-General's letters of 14 November 1995 telling them that the Board could not be set up and they were free under Regulation 41(b) to appeal to the Tribunal. The complaints are therefore not out of time.

11. Though receivable, the complaints are devoid of merit. The complainants argue that there were no grounds in law for dismissing them since the "winding up" of the secretariat was not a valid reason under Regulation 12.2. Moreover, the Association made no effort to assign them to suitable jobs in the new secretariat as from 1 July 1995. In their submission the whole exercise was an abuse of process.

12. After Austria, Finland and Sweden had left, the Association had to carry on with only four member States on a working budget that was but a fraction of what it had been before. It was therefore only reasonable for it to consider overhauling the secretariat and go ahead with the abolition of units and then of posts. As was said in Judgment 1614 (*in re* Morelli) of 30 January 1997 —

> "As circumstances change so must an organisation reform its structure, and that may mean doing away with posts. Even if abolition is not expressly provided for, no organisation can be required to abide for evermore by the same approach to what it has to do."

It was the EFTA Council of seven member States that resolved to wind up the secretariat, pay off the permanent employees and let fixed-term appointments run out. It saw that as the only proper course because of political uncertainty and lack of money to pay the staff after 30 June 1995. The seven States also wanted to safeguard the freedom of the four remaining members to set up a smaller secretariat which matched the smaller membership. There was no mistake of law in the Council's reasoning. Though understandably upset at the immediate birth of a smaller secretariat they did not belong to, the complainants did not expressly contest the rejection of their applications for the jobs available. They plead breach of Regulation 12.2(b) which confers priority for re-employment on permanent employees whose posts had to be abolished. But since all the posts were abolished the Association had no choice in the matter and nothing to offer the redundant staff but the opportunity of applying for jobs in the new secretariat. At all events the decision taken by the four remaining members in February 1995 to set up the new secretariat shows no abuse of authority. The complainants' plea on that score cannot be sustained.

13. The conclusion is that their claims to the quashing of the impugned decisions, to reinstatement and to awards of damages cannot but fail.

14. The defendant strongly objects to the complainants' producing privileged documents which it says they should never have disclosed without leave from the Secretary-General and which should therefore be discounted. The complainants explain that when still on the staff they were regularly sent such documents. So it is hard to see what is wrong with their relying thereon in pleadings that are confidential anyway. The Tribunal also refers to what it said on the issue in Judgment 1596 under 28 to 33.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

WILLIAM DOUGLAS MICHEL GENTOT MELLA CARROLL

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-THIRD SESSION

***In re* Aschenbrenner (No. 2),**
Tanner-Zwettler,
Girod and Hertzschuch

Judgment 1660

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Gerhard Aschenbrenner and the complaint filed by Mrs. Ingrid Tanner-Zwettler on 18 March 1996 against the European Free Trade Association (EFTA) and corrected on 21 June;

Considering the complaints filed against EFTA by Mr. Rémy Girod and Mr. Pierre Hertzschuch on 21 February 1996 and corrected on 21 June;

Considering EFTA's replies of 7 October 1996, the complainants rejoinders of 16 January 1997 and the Association's surrejoinders of 4 April 1997;

Considering the applications filed to intervene in Mr. Aschenbrenner's and Mrs. Tanner-Zwettler's complaints by:

P.R. Barron
J. Clivaz
C. Delley
L. Dores
C. Evalet-Arsène
R. Fardel
H. Haeberli
R. Hall
A. Hauksdottir
E. Maurer
J. Meaden
C. Moret
R. Portier
H. Reicher
A. Roulin
H. Schindl
E. Steinacker;

Considering the applications filed to intervene in Mr. Girod's and Mr. Hertzschuch's complaints by:

R.M. Artiss
J. Lanner
M. Meylan
D. Monnet
B. Palmer
X. Pintado;

Considering the Association's observations of 13 May 1997 on those applications;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written evidence and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Regulation 21(a) of the Staff Regulations of EFTA reads:

> "There shall be a Staff Insurance Scheme, the purpose of which shall be to protect the staff members of the Association and their families from the economic consequences of disability, old age and death of the staff member."

Article 4.1(a) of the Regulations of the Staff Insurance Scheme says:

> "The States members of the Association or associated with it together guarantee the payments of the benefits to be paid under this Scheme."

By decision No. 10 of 22 September 1977 the Council of EFTA said in paragraph 1:

> "The guarantee provided for [in Article 4.1(a)] shall, irrespective of transformation or dissolution of the Association, cover any payment due under the Scheme until the entitlement of the last beneficiary has ceased."

and in paragraph 6:

> "The Council shall conclude in due time an agreement with an appropriate institution providing that in the event of transformation or dissolution of the Association the institution shall take over the administration of the Scheme."

As Judgment 1613 (*in re* Evalet-Arsène and others) said under A, the Scheme, known as the SIS, was introduced in 1980 as from 1 July 1977.

At a meeting on 13 and 14 December 1994 the ministers representing the seven States that were then members of the Association adopted what they called a "common understanding". They "took note" of the withdrawal of Austria, Finland and Sweden at 31 December 1994 on their accession to the European Union at 1 January 1995. They agreed, among other things, to decide on the future of the Scheme by 30 June 1995.

On 20 July 1995 the representatives of the seven States that had been members of EFTA at 31 December 1994, sitting as what they called a "Supervisory Body at seven", approved the draft of a contract to be concluded between the Association and a private Swiss mutual insurance scheme, known as "Rentes genevoises", for the transfer thereto of the SIS. On 21 July those seven States and the Association as represented by the Secretary-General signed the contract with *Rentes genevoises*. They thereby undertook to provide the capital to cover current and future benefits and the payment of lump-sum entitlements to participants in the SIS.

Mr. Aschenbrenner, who was born in 1941, held a permanent appointment with the Association until he left on 30 June 1995. Mr. Girod, who was born in 1916 and held a fixed-term appointment, retired in 1981. Mr. Hertzschuch and Mrs. Tanner-Zwettler, who were both born in 1925, held fixed-term appointments. Mr. Hertzschuch retired in 1992 and Mrs. Tanner-Zwettler in 1994. By letters dated 21 July and 23 August 1995 the Secretary-General told them of the transfer of the Scheme to *Rentes genevoises*. On 21 October Mr. Girod and Mr. Hertzschuch each wrote a letter to the Secretary-General giving notice of appeal against that decision and seeking leave to go straight to the Tribunal. In letters of 30 November 1995 the Secretary-General answered that since it had not proved possible to set up the appeal body — the Advisory Board — the rules allowed direct appeal to the Tribunal. Those are the decisions that Mr. Girod and Mr. Hertzschuch are impugning. On 14 and 15 December 1995 Mr. Aschenbrenner and Mrs. Tanner-Zwettler wrote in like terms to the Secretary-General and by letters of 19 December, which they are impugning, the Deputy Secretary-General answered in the same terms as had the Secretary-General in his of 30 November 1995.

B. The complainants submit that the "Supervisory Body at seven", so called in the decision of 20 July 1995, was not competent *ratione personae* to make over the SIS, let alone to wind it up. According to the Convention of 4 January 1960 setting up the Association and the Council's decision of 22 September 1977, only the Council was competent to do so.

Secondly, they plead a mistake of law. The Association was free according to the rules to make over the insurance scheme save in the event of the "transformation or dissolution of the Association". The mere withdrawal of three countries from membership did not amount to either of those contingencies. In any event the Supervisory Body was not free to decide, as it did on 20 July 1995, that "The EFTA SIS will be terminated upon the fulfilment of the obligations of the Member States under Council Decision No.10 of 1977." The Association was bound by the terms of decision No. 10, or at least by a decision that the Council took on 20 January 1988 to index staff pensions to any increase in the cost of living as determined by the statistics office of the Canton of Geneva. Paragraph 7(c) of decision No. 10 says that the institution which takes over the Scheme "shall undertake to observe all provisions and implementing rules of the Scheme". There is breach of the rules on the adjustment of pensions in two respects: the maximum limit of 3 per cent a year set on such adjustment in Annex 5 to the contract with *Rentes genevoises*, and the failure to grant any adjustment at all for the period from 1 October 1994 to 30 March 1995.

The complainants' third plea is breach of their acquired rights. There is such breach in the entry into force of the contract with *Rentes genevoises*. There is further breach in the loss of their right to appeal to the Tribunal, which may not hear an appeal against a decision by a third party on a dispute over the application of the Scheme, even though a clause in the contract says that such appeal will lie.

They seek the quashing of the decisions of 30 November 1995 and 19 December 1995 insofar as they constitute "implied rejection" of their appeals of 21 October and 14 and 15 December 1995. They seek costs.

C. The Association replies that the complaints are irreceivable. Insofar as they are challenging the decisions of 30 November and 19 December 1995 they disclose no cause of action. The complainants' letters of 21 October and 14 and 15 December 1995, to which those decisions were the answer, did not amount to internal appeals. Insofar as the complaints are challenging the decisions which the Secretary-General communicated to the complainants in his letters of 21 July and 23 August 1995, they are out of time. Although the Staff Regulations and Staff Rules set no time limit for appeal to the Advisory Board, the complainants took some seven months from the date of notification of their claims to file their complaints. That is not what the case law means by a "reasonable time" and, besides, the Staff Regulations and Staff Rules do not set any time limit that exceeds six months. The Association further contends that the complainants have no cause of action because they are challenging the adoption of rules that cause them no injury. It observes by the way that there is no provision of the Statute of the Tribunal which confers competence on the Tribunal to hear appeals against the adoption of a rule. Moreover, the complainants have for the time being no cause to challenge the 3 per cent a year ceiling on the adjustment of pensions since so far inflation has fallen below that figure.

On the merits the defendant submits that it acted properly and in due compliance with decision No. 10 in making over the Scheme to *Rentes genevoises*. The body that met on 20 July 1995 was none other than the

Council as it had existed at 31 December 1994. As the highest authority of the Association it has the widest competence. The wording of decision No. 10 is flexible: it speaks of "transformation", a contingency that falls between the withdrawal of a single member State and dissolution. The Association made proper use of its discretion in taking the view that the withdrawal of three countries from membership brought into play paragraphs 6 to 8 of the decision, which set out the arrangements for transfer to an "appropriate institution". Such transfer was warranted, too, by the size of the three countries and by the uncertainty that clouded the Association's future because of the attitude of some member States towards the European Union. Moreover, had there been no transfer, the SIS would have had no active participants at all since the four member States set up a new pension scheme on 1 January 1995 for the remaining staff: it would have been a "closed" scheme. It would have been difficult too, if not impossible, for the seven member States to guarantee payments had the funds been paid into such a closed scheme.

The adjustment of pensions to the cost of living is not an acquired right. Article 19 of the SIS Regulations indexes pensions to salaries, and a decision is taken on salary scales each year. Moreover, the contract concluded with *Rentes genevoises* provides for a ceiling only on the guarantee of indexing.

The Tribunal does have competence to hear disputes about the Scheme even though the rules are being applied by the institution to which the Scheme has been made over. Should the Tribunal not accept that, however, the Association is willing to consider some other means of appeal.

D. In their rejoinders the complainants challenge the defendant's objections to receivability and to the Tribunal's jurisdiction. They press all their pleas on the merits. In their submission the "Supervisory Body at seven" is *sui generis* and not to be mistaken for the Council itself. They fail to see how countries that are no longer Members can still be represented on the Council. Besides, the mere withdrawal of three countries did not amount to "transformation". Lastly, rules that vest competence in a court of law must be narrowly construed. A staff member may not appeal to the Tribunal against a decision by a third party even though that third party has concluded a contract with the employer. The proposal to replace the Tribunal with some national jurisdiction would not afford the objectivity and effectiveness that the settlement of such disputes calls for.

E. In its surrejoinders the Association presses its objections to receivability. It maintains that the Tribunal may not hear claims to the quashing of rules. It presses in full its pleas on the merits. It contends that the complainants' right to the indexing of pensions was embodied in the Staff Regulations and Staff Rules, which referred to the pension fund rules and letters of appointment. The Regulations of the Scheme did not apply for the automatic indexing of pensions. In any event the Association was free to prescribe a system of adjustment that set limits on the alleged duty of indexing. The complainants are mistaken in pleading breach of their acquired rights.

Citing Judgment 1451 (*in re* Hamouda and others), the defendant contends that the Tribunal may hear disputes between the pension scheme of an organisation that has accepted its jurisdiction and the participants, even where the scheme has legal personality under Swiss law. The Tribunal derives competence from its own Statute and that competence is to be construed objectively. But the Association is willing to make a further declaration of recognition so as to vest in the Tribunal competence to hear disputes over the management of the SIS by *Rentes genevoises*.

CONSIDERATIONS

1. The European Free Trade Association (EFTA) set up for its staff a pension fund known as the Staff Insurance Scheme (SIS). The Scheme was financed by yearly contributions of 16 per cent of staff salary from the Association and 8 per cent from the staff themselves. Once a participant qualifies he is entitled to the payment of a pension, and the amount of it is the last yearly figure of salary multiplied by 2 per cent for each year of participation up to a maximum of 70 per cent. Article 19 of the Regulations of the Scheme, which is about the "adjustment" of pensions, reads:

> "1. Should the Council decide on an adjustment of salaries in relation to the cost of living, it shall grant an identical adjustment of the pensions currently being paid, and of the pensions whose payment is deferred.
>
> 2. The Council may consider whether an appropriate adjustment of the pension should be made taking into account increases in the standard of living."

Article 4.1(a) says that "The States members of the Association or associated with it together guarantee the payments of the benefits to be paid under this Scheme".

2. When Austria, Finland and Sweden left to join the European Union the Association terminated the contracts of service of EFTA staff. Since there were to be new arrangements for recruiting staff and for giving them

social insurance, contributions to the old Scheme were to stop. Despite some misgivings all seven countries that had been members of the Association at 31 December 1994 decided at a meeting they held on 20 July 1995 to authorise the Secretary-General to conclude a contract with *Rentes genevoises*, an outside scheme. It was to pay any pensions due under the SIS in consideration for a capital transfer of 45,904,432.65 Swiss francs. The contract with *Rentes genevoises* said, among other things, that the pensions would be guaranteed by the State of Geneva and that pensioners would be "free to appeal to the Administrative Tribunal of the International Labour Organization if any dispute arises over the management of the Staff Insurance Scheme by Rentes genevoises".

3. The Secretary-General of EFTA told the staff in letters dated from 21 July to 23 August 1995 about the new pension arrangements. Short of going into the details of the contract, he explained the practical arrangements, describing them as "solid and fair" and "a safe and effective solution for the continuity of the benefits under the EFTA SIS". He said that there would be changes in the indexing of pensions:

> "Instead of a yearly decision by the EFTA Council on the indexation of pensions, the new agreement stipulates an automatic yearly indexation of benefits based on inflation in Geneva (as measured on 1 July each year by the Office cantonal genevois de la statistique) up to the level of 3%. Furthermore a stabilisation fund is established drawing on money left over in years when inflation is less than 3% in order to provide for indexation of pensions, to its ability, beyond 3%, whenever inflation exceeds that figure."

4. Four former staff members of the Association are impugning decisions by the Secretary-General which in their view confirm the letters telling them of the change in scheme referred to above. The material dates are as follows:

- The letters telling Mr. Girod and Mr. Hertzschuch of the changes in the pension scheme are dated 21 July 1995. On 21 October 1995 they told the Secretary-General that they wanted to appeal against the decision notified to each of them and sought leave to go straight to the Tribunal. The Secretary-General answered on 30 November 1995 that it had proved impossible to set up the Advisory Board which heard disputes over the application of the Staff Regulations and Staff Rules in force up to 1 July 1995 and that they might therefore appeal straight to the Tribunal. They did so on 21 February 1996.
- Mr. Aschenbrenner and Mrs. Tanner-Zwettler are in like case, but the dates are not quite the same. The Secretary-General's original letters

were dated 23 August 1995, their applications for leave to go straight to the Tribunal were dated 14 and 15 December 1995, and the Deputy Secretary-General answered them on 19 December 1995. They filed their complaints on 18 March 1996.

5. Since the complaints raise the same issues of law they are joined to form the subject of a single ruling.

6. The Association contends that the complaints are irreceivable on several grounds. First, insofar as the complainants challenge letters that merely give them leave to appeal to the Tribunal they disclose no cause of action. Secondly, insofar as they purport to be challenging the decision to make over the SIS to *Rentes genevoises*, their complaints are out of time because the decisions were notified to them in July or August 1995. Thirdly, what they are purporting to challenge is the adoption of rules, and in any event those rules cause them no injury.

7. As to the first plea, it is true that the Secretary-General's and the Deputy Secretary-General's letters giving the complainants leave to come straight to the Tribunal do not formally reject their internal appeals, which did not expressly seek the quashing of the decisions they are now impugning. But the circumstances of the case are peculiar, the Association having failed to provide the internal means of redress that it ought. So it is hard to see any merit in the Association's objection to the complainants' appealing straight to the Tribunal. In answer to their appeals the Association could have told them that in its view no adversarial proceedings had yet taken place. Instead it acknowledged that their internal remedies were not available, "the Advisory Board having failed to report to the Secretary-General or to make proposals for settling the case within the prescribed time limits". So it must be deemed simply to have confirmed the decisions it had already taken in July and August 1995.

8. Although the complainants did not challenge those decisions in their appeals to the Advisory Board, there is nothing objectionable about that: the Advisory Board was never set up, and the rules set no time limit for appeal anyway. As was said in Judgment 1596 (*in re* Leicht and others) of 30 January 1997, on earlier EFTA cases, the ninety-day time limit in Article VII(1) of the Tribunal's Statute started to run at the date of receipt of the letters telling the complainants that the Advisory Board would not be constituted and that they would be unable to exhaust the internal means of appeal laid down in the Regulations. Contrary to what the defendant says in its surrejoinders, it was the official notification of that information, and not

the date at which the complainants might have had notice of it, that set off the time limit. Each of the four complainants therefore complied with the ninety-day time limit.

9. The Association's third objection is that the complainants are challenging the adoption of rules and in any event cannot impute any present injury thereto. According to precedent an international civil servant may in exceptional circumstances challenge the lawfulness of a rule that has been applied to him. The notification to the complainants of the changes in the system of reckoning and paying their retirement pensions constituted individual application of rules adopted by the member States of EFTA and set out in the contract with *Rentes genevoises*. Even though, as the defendant says, the complainants cannot yet show any injury, they do have a cause of action and may challenge, howsoever they wish, the lawfulness of the new pension rules.

10. In challenging the individual decisions to apply those new rules to them the complainants put forward three main pleas.

(1) Since the pension scheme forms part of their terms of appointment, the changes ought to have been made by the Council, not by the "Supervisory Body at seven" that decided to wind up the scheme and to empower the Secretary-General to conclude the contract for transfer to *Rentes genevoises*.

(2) The impugned decisions show a mistake of law. According to a decision that the Council took on 22 September 1977 the SIS was to be made over to an outside body only in the event of "transformation or dissolution of the Association". That decision also required the Association to make the SIS over only to a body that would abide by the principles and implementing rules of the Scheme, including the rule on the indexing of pensions to the cost of living. Yet the contract with *Rentes genevoises* sets a maximum on such indexing.

(3) There was breach of the complainants' acquired rights in the amendment to the rules on indexing and in the loss of the right of appeal to the Tribunal.

11. There is no merit in the plea that the "Supervisory Body at seven" was not competent to take the action that circumstances required. On 20 July 1995, when the decision to end the old scheme was taken, only four countries — Iceland, Liechtenstein, Norway and Switzerland — were still member States. True, the body ordinarily competent to run the Association was its Council, representing all the member States in accordance with the

Stockholm Convention and reaching decisions unanimously. But here the Council was acting on the "common understanding" that the ministers of the seven countries that were still member States at the time had adopted at their meeting on 13 and 14 December 1994. The Council took the view that the decisions on the future of the SIS "continued to be a common responsibility of the seven current EFTA Member States" and that "the necessary decisions should be finalized as soon as possible". So the delegation of authority was quite proper. What is more, it was quite understandable since the seven countries still owed the serving and the retired staff joint responsibility for safeguarding their entitlements. That is how the three departing countries were associated in the decisions on the future of the SIS. Besides, the decisions were unanimous, and there can have been no procedural flaw in the mere attendance — which was highly desirable anyway — of representatives of the former member States as well.

12. The complainants' second plea is that the Council was bound by its decision of 22 September 1977. Paragraph 6 of that decision said:

> "The Council shall conclude in due time an agreement with an appropriate institution providing that in the event of transformation or dissolution of the Association the institution shall take over the administration of the Scheme".

The argument is that only such transformation or dissolution warranted transfer and that even then there was no question of doing away with the SIS altogether. Yet it is hardly arguable that the Association did not undergo radical transformation on the loss of the member States. There has been a huge drop in its budget, its secretariat has been wound up, and its staff have gone. Those are indeed the administrative and financial consequences of a fact that the complainants do not deny: the departure of Austria, Finland and Sweden has reduced by 97 per cent the volume of the trade between member States. That being so, one of the contingencies anticipated in 1977 came to pass. So the Council made no mistake of law in relying on the decision then taken and making the SIS over to an "appropriate institution" to manage. Although the transfer meant doing away with the Scheme altogether, a step that the decision taken in 1977 had not contemplated, there was nothing wrong with that so long as pension entitlements were observed and member States were not shirking the duty of guaranteeing them. Member States also made over funds to *Rentes genevoises* to finance the Scheme, and *Rentes genevoises* undertook to pay all the benefits due: a text setting out the indexing of pensions is appended to the contract. The conclusion is that the winding up of the Scheme was merely formal: in fact it survives in a new form.

13. Yet the transfer of management must not allow of breach by *Rentes genevoises* of the rules on the reckoning of pensions, and on that score the complainants put forward their third plea. The defendant made a mistake of law — they say — in agreeing that indexing to the cost of living may not yield an increase of over 3 per cent a year. The complainants do not object to the substitution of automatic indexing to the rate of inflation in Geneva for the indexing to salary that is provided for in Article 19(1) of the SIS Regulations. The Association having been overhauled, indexing to salary would make precious little sense and indeed had already been dropped. What they do object to is a breach of Article 19 and of later decisions which, they say, required automatic indexing to the cost of living. If there were such breach — they argue — the setting of the 3 per cent a year maximum would not be in line with the guarantees granted to pensioners. All that Article 19(2) of the SIS Regulations said was that the Council would see whether there should be "appropriate adjustment" of pensions to take account of movements in the cost of living. Although until 1994 the practice was to index pensions even where there was no rise in salary, there was no written rule embodying such practice; there were just budgetary decisions. So the practice conferred no rights on the complainants and they may not object to its discontinuance between 1 October 1994 and 30 March 1995. The new arrangements for automatic indexing to inflation in Geneva are not inferior to the old ones. Setting a ceiling is not in itself objectionable since the actual figure is reasonable and there is to be a "stabilisation fund" to allow going above the ceiling in any year in which inflation goes above 3 per cent after being below that figure.

14. That disposes of the complainants' plea of mistake of law in the new system of indexing. But the same answer holds good for their plea of breach of their acquired rights in the loss of guarantees. There was neither written rule nor practice entitling them to full indexing to the cost of living. So the imposition of the ceiling, which is only a contingency anyway, cannot be regarded as breach of their acquired rights.

15. The complainants' last plea is that the contract with *Rentes genevoises* means that pensioners forfeit their former safeguard of appeal to the Tribunal. That is a more delicate issue. According to Judgment 1330 (*in re* Bangasser and others) of 31 January 1994 and other precedents, the right to appeal to an international administrative tribunal forms part of the essential safeguards that international civil servants must enjoy. The defendant surely realised that access to the Tribunal formed part of its staff's acquired rights; else the contract with *Rentes genevoises* would not have

said, in Article 11, that participants and their successors "may appeal to the Administrative Tribunal of the International Labour Organization in the event of dispute over the application of the Staff Insurance Scheme by Rentes genevoises". In other words, the right of appeal to the Tribunal has not been overlooked and there is no breach of any acquired right on that score. Yet actual recognition of the right of appeal will be assured in law only when the Association has addressed to the Director-General of the International Labour Office, in accordance with Article II(5) of the Tribunal's Statute, a declaration extending its jurisdiction to disputes between *Rentes genevoises* and any former EFTA staff who allege breach of their rights under the Scheme. Pending such declaration a dispute may still be referred to the Tribunal in accordance with Article 7(c) of Appendix I to the SIS Regulations, of which the observance is guaranteed by Article 11 of the contract with *Rentes genevoises*. But in that event too only the Association would be the defendant before the Tribunal, and only the Association would be required to give effect to its rulings.

16. The conclusion is that the plea of breach of acquired rights cannot succeed, and that the complaints must therefore fail.

17. Since the complaints are dismissed, so too are the applications to intervene, there being no need to determine whether they are receivable.

DECISION

For the above reasons,

The complaints and the applications to intervene are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

WILLIAM DOUGLAS MICHEL GENTOT MELLA CARROLL

A.B. GARDNER

Registry's translation,
the French text alone
being authoritative.

EIGHTY-THIRD SESSION

***In re* Paré** **Judgment 1661**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Michel Paré against the World Heath Organization (WHO) on 17 November 1995 and corrected on 12 February 1996, the WHO's reply of 13 May, the complainant's rejoinder of 22 August and the Organization's surrejoinder of 2 December 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of Burkina Faso who was born in 1945, joined the WHO in 1974 as a clerk at grade OU.5 at Ouagadougou, where he worked under its Onchocerciasis Control Programme (OCP). It promoted him several times and in July 1989 put him on a P.4 post as budget and finance officer.

In a letter of 15 March 1993 the Director of the Programme told him of a rumour that he had perverted his official position for his own enrichment; pending the outcome of investigation he was suspended forthwith, albeit on full pay. In a letter of 19 March the Director informed him of the charges against him as budget and finance officer and as chairman of the Property Survey Committee of the Programme. Most of the charges were to do with the sale of vehicles removed from the Programme's pool and the importing of petrol.

In a letter of 23 March the complainant confessed to some of the charges but denied doing anything that practice did not condone. After correspondence the Director told him in a letter of 8 April that, being dissatisfied with his answers and explanations, he was ordering an internal audit by accountants from headquarters. The audit was done in the next few weeks and the Chief of the Office of Audit and Administrative Management submitted his report on 25 June.

In a letter of 10 July the Director informed the complainant of the findings, which he said showed misconduct within the meaning of Staff Rule 110.8, and asked him to reply within eight days. In a letter of 16 July the complainant answered in detail. For the most part he admitted what had been going on but made out that it was not serious and he was not liable anyway. By a letter of 27 July 1993 the Director gave him notice of dismissal as from 27 July for misconduct under Rule 1075.1.

On 20 August he appealed to the regional Board of Appeal. In its report of 22 July 1994 the Board recommended upholding his dismissal. The Regional Director for Africa did so and told him in a letter of 10 November 1994. On 26 January 1995 he appealed to the headquarters Board of Appeal. In its report of 30 June the Board held that the complainant had "abused his position, status and prerogatives as a senior WHO officer to the Organization's detriment" and recommended rejection. In a letter of 16 August 1995 to the complainant - the impugned decision - the Director-General endorsed the recommendation.

B. The complainant submits that his dismissal for misconduct was in breach of the material rules, particularly Rules 1075.1 and 1130, which do not allow such dismissal unless the staff member has been informed of the charges against him and been given his say.

Although the auditors allegedly heard witnesses, he was unable to cross-question most of them and so was denied the opportunity of defending himself.

There was no proof of misconduct and he was dismissed largely from personal or political motives or both.

He asks the Tribunal to quash the decision of 16 August 1995, order reinstatement and award him the costs of his appeals. Failing reinstatement, he claims "his salary for the 12 years of service remaining after his dismissal" and 300,000 United States dollars in damages. He applies for hearings and for the disclosure by the WHO of several items of evidence.

C. The Organization replies that the charges against the complainant are well-founded; that what he did amounts to misconduct within the meaning of Rule 110.8 and warrants dismissal under Rule 1075.1; and that there was no breach of due process.

On the last issue it points out that the Director's letter of 10 July 1993 set out the full particulars of the charges and said no more than what had already been said in earlier letters to him. What is more, he answered in great detail.

There was no breach of due process in withholding from him the reports of the Investigating Committee and the internal auditors since all the charges upheld against him and warranting the dismissal were set out in detail in the letter of 10 July 1993.

Contrary to what he contends, he did question a witness.

Lastly, the Organization sees no point in hearings.

D. In his rejoinder the complainant challenges the WHO's version of the facts and presses his pleas about breach of due process.

E. In its surrejoinder the Organization submits that the complainant's explanations are without merit and presses its pleas.

CONSIDERATIONS

1. The WHO recruited the complainant on 1 July 1974 as a clerk at grade OU.5 under its Onchocerciasis Control Programme in West Africa (OCP) at Ouagadougou, in Burkina Faso. It promoted him several times. On 1 September 1978 it appointed him to the post of finance officer at grade P.1. It promoted him to P.2 and then to P.3. On 1 July 1989 he became budget and finance officer at grade P.4. As chairman of the Programme's Property Survey Committee he was in charge of selling to the highest bidder motor vehicles removed from the Programme's stock.

On 21 February 1993 he had his appointment extended from 30 June 1993 to 30 June 1995.

The Director of the Programme had doubts about the propriety of his behaviour. The Director suspected him of deriving illicit gains for himself or persons unknown from the sale of the superannuated vehicles and the importing of duty-free petrol in the Organization's name for his own purposes. On 11 March 1993 the Director had two senior officers, the chiefs of Administration and Management and of Vector Control, make a thorough check of the management of the Programme's property over the last three years. On 15 March the complainant was told that he was suspected of abuse of his official position for private gain, there was to be an investigation, and he was suspended with pay under Rule 1120. In a letter of 19 March the Director told him of the charges and in accordance with Rule 1130 called him to account. He answered in a letter of 23 March. In a letter of 1 April the Director put further questions and he answered them in a letter of 6 April. On 8 April the Director said that he had asked for an audit by headquarters. The audit office submitted to the Director a report dated 25 June. In the light of the report the Director informed the complainant in a letter of 10 July of the substantiated heads of charge against him, again invited him to comment, and set out the material rules in an appendix. In a letter of 16 July the complainant answered the charges.

By a letter of 27 July the Director dismissed him forthwith for misconduct; granted him under Rule 1075.1 one month's pay in lieu of notice; agreed to compensate him for accrued annual leave; and gave exceptional consent to the grant of six months' pay in termination indemnity.

The complainant asked to see the reports on the investigation and the audit but was told that they were internal documents and that he had been told anyway of the charges in them.

On 20 August he appealed against the decision of 27 July to the regional Board of Appeal. The Board sent him the two reports. It recommended rejecting his appeal, and the Regional Director for Africa did so on 10 November 1994.

The complainant appealed against that decision in turn. On the recommendation of the headquarters Board of Appeal the Director-General rejected his appeal by a decision of 16 August 1995.

The complainant's claims are, in short, to the quashing of that decision, to his reinstatement and to his full costs. Failing reinstatement, he seeks the payment of remuneration for the twelve remaining years of service from the date of his dismissal and an award of 300,000 United States dollars in damages.

The Organization seeks the dismissal of his complaint. The charges which it has brought against him and which afford the grounds for dismissal and his objections to the impugned decision are taken up below.

2. The complainant has applied for hearings to take evidence from several witnesses and from himself and has asked the Organization to produce several items of evidence, which it has.

For the following reasons there is no need for hearings or for the taking of evidence from the proposed witnesses.

(a) The complainant has already had ample opportunity of stating his case.

(b) There is no need to take evidence from the author of the audit report, since the report has been submitted as evidence and the main facts it sets out are not contested insofar as they are cited in the decision to dismiss the complainant.

(c) There is ample evidence on the secret importation of petrol: see 5 below.

(d) There is no need to hear a witness about the terms of sale of two "Saviem" vehicles (IN 0444 BF and IN 1095 BF): the complainant has dwelt on the subject at length and the Organization has acted on what he said.

(e) Nor need the Tribunal hear evidence from a serving staff member and a former one to demonstrate that the auditors put witnesses under duress. For the most part the facts are not in dispute and the Organization has accepted the complainant's own statement.

(f) For the same reasons it would serve no purpose to hear a witness whom the complainant cross-questioned in the Director's presence in the internal appeal proceedings and who he says broke down while giving evidence about the ordering of one of the two vehicles from Côte d'Ivoire in February 1993.

3. The complainant pleads a procedural flaw. In the proceedings that culminated in dismissal the WHO would not let him see all the evidence, more particularly, the investigation and audit reports, or adduce evidence of his own, or refute the evidence against him, for example by cross-questioning witnesses.

Before an organisation imposes a disciplinary penalty such as dismissal it must warn the staff member and give him the opportunity not only of stating his own case but also of refuting the organisation's: in other words, there must be due process. So he must be told of the charges and of the evidence against him. If the proceedings are to be properly adversarial, he must be free to give his own version of the facts, refute that evidence, adduce his own, take part in the discussion of it, and at least once cross-question the expert and other witnesses. See, for example, Judgments 512 (*in re* Diaz de Borsody No. 2) under 5; 907 (*in re* Pereira da Cruz No. 2) under 4; 999 (*in re* Sharma) under 5; 1082 (*in re* Liégeois) under 18; 1133 (*in re* Manaktala) under 7; 1212 (*in re* Schickel-Zuber) under 3; 1228 (*in re* Kigaraba) under 4; 1251 (*in re* Tuffuor) under 8; 1384 (*in re* Wadie) under 5, 10 and 15; 1395 (*in re* Walter) under 6; 1484 (*in re* Thuillier) under 7 and 8. These requirements do not apply when the organisation is merely taking protective measures: see Judgment 1346 (*in re* Demonet).

It does seem wrong that the Organization refused the complainant the texts of the audit reports, which were analogous to evidence from expert witnesses, and that before he was eventually dismissed his right to fair and adversarial preliminary proceedings was somewhat restricted.

Yet in the circumstances there was due process. By his letter of 10 July 1993 the Director of the Programme informed him of the evidence against him that the two reports contained. The regional Board of Appeal let him see the reports and he was able to discuss them before both the regional and headquarters Boards. The headquarters Board heard the parties and the complainant's own witnesses. Indeed in his appeal to the headquarters Board he waived his objection to breach of due process prior to dismissal. That being so, and much time having elapsed since that decision was taken, it would be in bad faith for him to plead such breach now in support of an application for starting the procedure all over again. The salient point is that he did get a proper hearing as to the charges on which the dismissal rested. The truth of most of them he has not even challenged and, as for the others, he either admits to them or has had ample opportunity of exercising his procedural rights.

The conclusion is that there are no grounds for quashing the impugned decision for the purpose of ordering new proceedings.

4. (a) The Director's letter of 10 July 1993 set out the heads of charge against the complainant. It also quoted the main rules about the sale of WHO assets:

> A.1 "All bids are submitted to the Property Survey Committee [PSC] which may accept a bid other than the highest, or may reject any or all bids when they consider this to be in the interests of the Organization".
>
> A.2 "Should a member of the public and a staff member make an identical bid, preference is given to the staff member's bid."

"In addition, when the price offered by a staff member is very close to a higher price proposed by a successful bidder from outside, the staff member shall be considered first."

B. "Vehicles bought should be used for the personal purposes of the staff member and should not be sold later."

C.1 "The bid processing sheets and the bid are initialled by all the members of the Committee and listed in order of merit. Minutes on the bid opening are written and signed by the members before sending letters to the best bidders for each vehicle."

C.2 "As soon as a buyer pays the amount on his bid and receives a receipt from Finance, he is given the full file on the vehicle and he goes to SSO [Supply Service Officer]. The letter makes a request for authorization for customs formalities. As soon as this authorization is given, the beneficiary of the vehicle carries out the customs formalities."

C.3 "The Chairman of the PSC issues a certificate of sale to the beneficiary, who goes to the licensing office with the customs payment receipts."

C.4 "The PSC gives him a collection bill in the form of a memorandum which he presents to TMO [Transport Management Officer] before taking possession of the vehicle."

D. "... another possibility is to wait for an eventual withdrawal by the best three bidders. In such a case, we sell the vehicles by mutual agreement at reduced prices."

The charges in the Director's letter may be summed up as follows:

First come breaches of internal rules.

1. For the sale of vehicles in 1992 the order of the original list of bids was not followed. Of 44 vehicles 15 were sold to staff to the detriment of outsiders or staff who had made higher bids. In 13 of these cases the staff members paid the equivalent of the top bid: in the other two they paid less. The members of the Committee did not sign the minutes but the complainant as chairman used them to send out letters of attribution.

   That was in breach of rules A.1, A.2 and C.1.

2. The complainant sold two vehicles registered in Togo to OCP staff for less than the amount of a bid from an OCP staff member that was equal to the best outside one.

   That was in breach of rules A.1, A.2 and D.

3. For another vehicle the highest bidder got no letter of attribution. The second highest was directly approached and got the vehicle for a figure that was 105,000 CFA francs above his original bid.

That broke rules A.1 and C.1.

4. From the sale in 1992 the complainant himself took two vehicles, one for resale and the other for a friend.

   He thereby broke rule B.

5. On the complainant's instructions the same two vehicles were cleared through customs, made over to "non-OCP drivers" and taken to the complainant's own address: there had been neither payment nor declaration of sale nor "collection slip".

   Rules C.2, C.3 and C.4 were infringed.

6. One vehicle was sold to an OCP staff member for 150,000 CFA francs by mutual agreement although his initial bid — and not the best one at that — had been 333,333 francs.

   Rules A.1, A.2 and D were thus broken.

   Besides, the chairman was not free to act on his own, as the complainant did.

Second come charges of breach of customs rules and procedures

1. *Breach of the customs regulations of the Côte d'Ivoire applicable to vehicles sold in that country*

(a) For any vehicle sold in the Côte d'Ivoire the WHO must apply for customs discharge as the beneficiary of the tax exemption.

(b) For any vehicle sold outside the Côte d'Ivoire to a third party an application for customs discharge has to be followed by one for export.

(c) When the WHO itself applies for re-exportation no customs payment is required but formalities have to be met.

The two vehicles exported from the Côte d'Ivoire to the complainant's private address in Ouagadougou were misrepresented as being exported by the WHO. So was another exported to Mali for an OCP employee.

2. *Breach of the customs regulations of Burkina Faso*

   The complainant often had twelve-gallon drums of petrol imported from Togo for his own use. Under the customs regulations of the host country that amounted to smuggling.

Third are charges of misconduct.

1. *The improper use of names*

   Letters of attribution were sent to three people who were not the actual buyers of the vehicles. They say that their names were used without their knowledge. Two of the sales were of motor cars which the complainant bought under a false name, one for resale and the other for a friend.

2. *Tampering with a receipt*

   A receipt was issued on 4 March 1993 for the purchase of a vehicle. The complainant changed the date to 24 February 1993.

3. *The sale of two vehicles by mutual agreement at a discount*

   Two "Saviem" vehicles went by mutual agreement to a local dealer for 1,800,000 CFA francs although the Property Survey Committee had earlier turned down a bid of 3,120,050 francs as too low. On 14 January 1993 the complainant wrote a letter as a private person to himself as chairman of the Committee bidding 1,400,000 francs for the two vehicles. The TMO found the sum insufficient. The complainant then sold them himself without consulting the Committee. Though they had not been paid for he made over the papers to the buyer.

4. *Delivery of vehicles without payment*

   Under this head there is further reference to the same two vehicles that the complainant had delivered from the Côte d'Ivoire to his own address, before they had been paid for. The sum of 310,000 francs was not yet paid.

(b) In his letter of 16 July 1993 the complainant confessed to "breach of rules A.1 and A.2 of the procedure for some of the vehicles got rid of in 1992", but said he thought that the Committee had known all along and had "collectively condoned the breach".

He denied having "any malicious intent as to the two vehicles from Togo". "Was it not", he asks, "because we were sidestepping the rules that we entered explanations in the minutes for approval by the Director?"

He said that he had no comment to offer on matters that secretaries were in charge of.

He contended that of the two vehicles driven to his own address one was indeed for a friend, but the other was originally intended for someone — Mr. Konate Kati — whose name was on the delivery list. When Mr. Konate backed out after receiving the letter of attribution he felt bound to take over the deal himself. With the money paid by the friend he was able to do so promptly. For the other vehicle he had already paid 300,000 francs and would shortly be producing the balance of 310,000.

The reason why he sold a car for 150,000 francs when the original bid had been 333,333 was that that bidder too backed out and lowered his bid to 150,000, which the complainant accepted.

He said that breach of the customs regulations of the Côte d'Ivoire had nothing to do with him: some services of the Programme were to blame.

He does not deny smuggling petrol but says it was not as much as was made out.

He denies improperly using the names of Mr. Konate Kati and Mr. Kone Amara and says he used Mr. Robert Toe's with his consent.

He did not tamper with the receipt for 300,000 francs; he just got the cashier to correct it to show the actual date of payment, which was 24 February 1993.

He contends that the sale of the two vehicles for 1,800,000 francs meant no loss for the Organization, though he does admit to handing over the papers for the vehicles before they were paid for. And the Programme has suffered no loss since the vehicles for which there is no certificate of sale remain its property.

(c) The reasons stated for the dismissal are as follows. Citing the correspondence, the Director says that the investigation and the complainant's answers –

> "afford ample evidence of your liability: you abused your official position to secure private gain for yourself and your friends to the detriment of the Programme. You failed to comply fully with WHO/OCP rules and procedures for the disposal of the Programme's assets. You made deals in utter disregard of the rules. You acted alone and neglected to tell the Property

> Survey Committee. You infringed customs regulations and procedures by smuggling drums of petrol in OCP vehicles. You appropriated without payment two vehicles that you had someone remove from OCP premises."

The Director dismissed him on the grounds that such acts were inadmissible and tantamount to misconduct.

(d) The headquarters Board of Appeal held:

> "The complainant admitted to the Board that he had 'stretched' the rules, whereas, as budget and finance officer, chairman of the Property Survey Committee and acting chief of Administration of the Programme, he had the duty of preventing abuse both within and outside the Programme. The Board observes, by the way, that it is unwise to vest so much responsibility in any one person when no provision is made for accountability.
>
> The Board believes that the 'stretching' of the rules went far beyond any policy of giving preference to OCP staff without harm to the WHO's interests. Nor may the appellant plead any mitigating circumstances since the duty of safeguarding the Programme's property and finances was foremost his."

(e) In its pleadings to the Tribunal the Organization — as did the Director — rests its case on facts acknowledged by the complainant, save that he has withdrawn his confession to the smuggling of petrol. It concludes that those facts amount to misconduct warranting dismissal.

(f) The Tribunal holds likewise that there is no need to go beyond those facts and that suspicions about others that were mentioned at the outset of the disciplinary investigation may be discarded. An organisation that levels charges of misconduct must bear them out: see Judgments 635 (*in re* Pollicino) under 7, 969 (*in re* Navarro) under 16 and 1384 (*in re* Wadie) under 10.

5. The Tribunal will take up separately the charge that the complainant time and again broke customs regulations by importing cheaper petrol from Togo for his own use without declaring it to the customs of Burkina Faso.

On 2 April 1975 he was given a stern warning for having procured some eight gallons which he got a driver of the Programme to buy for him in Ghana. He thus infringed the customs regulations of Burkina Faso and the currency regulations of Ghana.

In his letter of 23 March 1993 he admitted to "having got drivers to buy petrol in Togo" but said that other staff had likewise abused the WHO's privileges. In his letter of 16 July 1993 he owned up to bringing in petrol from Togo in twelve-gallon drums but said that the Organization should not think that he had done it often nor, in particular, that Mr. Bazie, a driver, "had done so on all his trips to Togo in December 1992". He again alleged that other staff were just as guilty, or even more guilty, of breaking customs regulations.

In his pleadings he objects to the Organization's not taking evidence from the driver who brought in the drums, who could have proved that the complainant asked him only to bring them back empty so that they could be used for water.

Since he did not ask for the hearing of such evidence in the internal appeal proceedings the Organization did not abuse its authority by confining itself to his repeated admissions and declining to hear the driver. Nor will the Tribunal order a hearing, the complainant having failed to explain why he made false confessions. In his rejoinder he says that he was covering up for a friend who had asked the driver to bring back a drum of petrol duty free. His new version is the less plausible because it does not account for the repeated importation of petrol drums, because the friend is dead and because someone threatened with dismissal was unlikely to confess to misconduct he had not been guilty of.

The conclusion is that there are no grounds for not accepting the Organization's reading of the evidence.

6. Misconduct so serious as to warrant dismissal is such that letting the appointment continue would be intolerable.

(a) As a strong line of precedent has it -

> "besides carrying out his allotted task an international civil servant has a duty to show such dignity of behaviour as not to harm the good name that the organisation must enjoy if it is to do its job properly. He must in particular abide by the law and respect the public order of the host state or of any other country it may assign him to."

See Judgments 1550 (*in re* Merchan) under 14 and 15, on abuse of the diplomatic pouch, 1584 (*in re* Souilah) under 9, and the precedents cited therein. The higher the rank the greater the duty of diligence.

Time and again the complainant broke customs regulations to the detriment of the host State under cover of privileges that the Organization is granted in order to carry out its mandate. His conduct was such as to undermine the trust it must enjoy and to compromise the attainment of its objectives. That there was misconduct is indeed beyond gainsaying, especially in someone of his position who went on breaking the rules even after a warning in 1975.

(b) The complainant managed WHO assets. He was in charge of the resale of superannuated vehicles of the Programme under written rules intended not just to protect those assets but also to put trust in the Organization through fair and open management.

The complainant broke the rules on resale. Bidders were not put on a par. Some staff were given preference over others or over higher bidders. The order of the attributions was not always observed. The Property Survey Committee was not consulted as it should have been. Vehicles or vehicle papers were sometimes arbitrarily handed over before payment, just to suit the buyer. The complainant himself bought or tried to buy vehicles that ought to have been sold on. All that was not only in breach of the material provisions but cast discredit on the Programme and gave an impression of arbitrariness, favouritism and graft, even supposing that, as he says, he made no money himself out of it. Viewed objectively, such behaviour became intolerable for the Organization and amounted to misconduct.

(c) To pass muster, dismissal must be proportionate to the offence: see Judgments 1550 under 16 to 18; 1584 under 11, and the precedents cited therein. To ascertain whether it was in this case, it is necessary to assess the objective and subjective seriousness of what he did.

Not only was his misconduct serious in itself but his high position and repeated breach of the rules, even after being warned, made it worse. There was a risk, too, that he would not stop there. It was obviously vital to the Organization's interests and good name to get rid of him. He held a two-year contract, and his conduct made renewal of it unlikely. Dismissal was not disproportionate to his offences. The Director of the Programme did not misuse his discretion in taking such disciplinary action.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

WILLIAM DOUGLAS E. RAZAFINDRALAMBO EGLI

A.B. GARDNER

Registry's translation, the French text alone being authoritative.

EIGHTY-THIRD SESSION

In re **Patrizi** **Judgment 1662**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Antonio Patrizi against the European Organization for Nuclear Research (CERN) on 27 September 1996, CERN's reply of 17 January 1997, the complainant's rejoinder of 19 February and the Organization's surrejoinder of 26 March 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Italian who was born in 1938, joined the staff of CERN in 1962. He became an established member of the staff on 1 January 1965 and he resigned on 31 August 1977.

By a memorandum of 13 July 1976 he asked for information about his entitlements from participation in the Organization's Staff Insurance Scheme. In a letter of 30 July the Scheme told him that if he left the Organization by 31 December 1976 he would be entitled either to the repayment of his own contributions under Article 21 of the Regulations of the Scheme; or to assignment of the "transfer value" — which was 71,000 Swiss francs — to some other social insurance scheme in accordance with Article 16; or to a pension under Article 18, payable from 1 June 1998, the first of the month following his sixtieth birthday.

By a letter of 6 July 1977 the complainant asked the Scheme to pay the transfer value into his own bank account. In several conversations the officers of the Scheme explained to him that the amount might be paid only to another social insurance scheme.

In the ensuing correspondence he asked, among other things, for reinstatement in the Organization — which it refused — and for the grant of a partial disability pension because of an occupational accident that had occurred in 1969.

By a letter of 30 March 1979 an officer of the Scheme told him of a decision to pay him a 10 per cent disability pension as from 1 September 1977 and asked him to say what was to be done with the transfer value. In an undated letter the complainant answered that he could not yet say.

He did not get in touch again until 3 July 1993, when he wrote a letter to the Pension Fund, which had by then replaced the Scheme. His letter set off further correspondence about the transfer value and his retirement pension. By a letter of 4 March 1996 the Fund confirmed that he would get a deferred retirement pension but said that the assignment of the transfer value to another insurance scheme ought to have been made when he had left the Organization.

On 30 April 1996 he filed an appeal with the Governing Board of the Fund against the decision of 4 March. By a letter of 27 June 1996, the impugned decision, the Governing Board told him that it was offering him the following options: the repayment of his contributions, which came to 40,529 Swiss francs; the assignment of the transfer value of 71,225.60 francs to some other insurance scheme; or a deferred pension to be paid from 1 June 1998. The Board asked him to make his choice by 30 July 1996; failing that, it would take the view that he had opted once and for all for a deferred pension.

In a reply of 6 August to a letter which he had sent on 29 July the Fund said that since he had failed to opt for the repayment of his contributions or for the assignment of the transfer value his choice was irrevocably assumed to be the deferred pension.

B. The complainant objects to CERN's refusing to "increase the amount of the occupational benefit that had accrued to him by the date of his departure". He says that its refusal is contrary to widespread practice.

He submits that he is entitled to the payment of the transfer value. Although the "present" Rules of the Fund say that where the transfer value is not claimed within one year it shall be converted into a deferred pension, they are not binding on him because he was never sent the text. The transfer value has to be increased anyway because the Fund is now better off; otherwise it would be guilty of unjust enrichment and breach of good faith.

He contends that, contrary to what the Fund said in its letter of 6 August 1996, he did not in his letter of 29 July 1996 refrain from claiming the repayment of his contributions or the assignment of the transfer value; he merely took note of the consequences of the Fund's decision.

He expresses surprise at the Fund's allowing him only one month in which to make his choice instead of the one year provided for in its present Rules.

He asks the Tribunal to:

- declare that the Governing Board's offer of 27 June 1996 offends against Article 21 of the Agreement between Switzerland and CERN and the rules and practice of occupational and other social insurance schemes as to the enhancement of lump sums; and
- to order the Fund to pay to whichever insurance scheme he may name the amount of the transfer value, consisting of 71,255.60 Swiss francs, and interest to be reckoned at the prevailing rates as from 9 March 1979.

C. In its reply CERN argues that the impugned decision, which merely offered him three options, causes the complainant no injury. Besides, his complaint is irreceivable insofar as it puts forward new claims: he has not before sought the payment of interest on the transfer value.

In subsidiary argument the Organization contends that according to the Fund's consistent policy he is no longer entitled to assignment of the transfer value. That being so, he can no longer claim interest thereon either. Besides, the material rules say nothing of interest.

D. In his rejoinder the complainant submits that, although he took long to say what the Fund was to do with the transfer value, the reason was the Organization's own failure to tell him before he filed his internal appeal about its alleged "practice" in the matter.

He maintains that the impugned decision does cause him injury because it foists on him an unadjusted lumpsum. He is still entitled to payment of the sum since the offer he was made in 1976 was never withdrawn, indeed was put to him again in 1996.

He names the social insurance scheme to which the sum may be assigned.

E. In its surrejoinder the defendant accuses the complainant of bad faith in saying that he was never told about the Fund's practice. It points out that the Fund was under no strict obligation to make him the proposal in 1996, which was an *ex gratia* offer. Naming at last a social insurance scheme to which the sum may be assigned does not revive any right to such assignment.

CONSIDERATIONS

The material facts

1. CERN recruited the complainant in 1962 as an assistant storekeeper and granted him a permanent appointment in 1965. In 1969 he had an accident at work. On 11 June 1976 it declared him to be disabled. He considered resigning. He first wrote, however, on 13 July 1976 to the Organization's Staff Insurance Scheme, which later became the Pension Fund, to ask what amounts he might be entitled to, if he did resign, in capital transfer value or deferred pension.

2. The Scheme's answer of 30 July 1976 was that if he resigned he would be entitled either to the repayment of his own contributions or to the assignment of the transfer value — estimated at 71,000 Swiss francs — to some other social insurance scheme or to the payment of a pension from the first of the month following his sixtieth birthday, i.e. from 1 June 1998.

3. On 27 June 1977 he resigned as from 31 August 1977. On 6 July 1977 he told the Scheme that he wanted payment of the transfer value "so as to enhance [his] insurance against old age by buying a house". After several talks with him about his entitlements the Scheme answered on 10 January 1978 that the transfer value was payable only to some other social insurance scheme; alternatively, he might claim the payment of his contributions; and he should state his preference.

4. On 30 January 1978 the complainant wrote to the Director-General of CERN to say that the Staff Association had explained that, if he did not get the money he was entitled to, his resignation would not hold good; so he wanted the Director-General to say whether he was still on the staff. In a letter of 3 February 1978 the Leader of the Personnel Division referred him to his memorandum of 13 July 1976, to the Scheme's reply of 30 July 1976 and to the correspondence between him and the Organization; said that he had been quite aware of his entitlements from the Scheme on 27 June 1977, when he had tendered his resignation; and that, CERN having accepted it, he had not been a member of its staff since 31 August 1977.

5. On 2 March 1978 he applied for a partial disability pension. In October 1978 he applied for reinstatement on the grounds that no decision

had yet been taken on his application for a disability pension or on the payment of the "repurchase or transfer value" of his entitlements. The Leader of the Personnel Division wrote to him on 18 October 1978 to say that his claim to reinstatement was dismissed and that he would be told in due course of the outcome of his application for a disability pension. As for the transfer value, he had been made an offer in the Scheme's letter of 10 January 1978 but had never answered.

6. In a letter of 30 March 1979 the Scheme told him that it would pay him a 10 per cent disability pension; as for the transfer value, it was still awaiting an answer to its letter of 10 January 1978. It sent him a new statement of the transfer value less the amount of his disability pension. He wrote to say that he was unable to answer the letter of 10 January 1978 and nonplussed at the deduction of the pension. The head of the Finance Division then explained that the two sorts of benefit were not cumulative and that the Organization was still awaiting his instructions for assignment of the transfer value.

7. Years went by without communication between the parties. At last, in a letter of 3 July 1993, the complainant wrote to ask the CERN Pension Fund how much his retirement pension would be at the age of sixty. On 2 August 1993 the Fund answered that according to the records nine-tenths of his assets had been paid to him in the form of a transfer equivalent to 71,225.60 Swiss francs. Only on 29 September 1995 did the complainant react by pointing out that he could find no trace of any such payment. He said that at the time he had been looking for a social insurance scheme to which the transfer value might be assigned. He asked the Fund to look into the matter. On 27 November 1995, the Fund wrote to say that it had found no trace of any payment and that he would therefore get a 90 per cent deferred retirement pension.

8. On 21 February 1996 he asked the Fund how much the transfer value of his pension entitlements by then amounted to. On 4 March the Fund answered that since he would be getting the deferred pension he had no right to assignment of the transfer value; indeed he had forfeited it long ago by failing to answer its offer.

9. On 30 April 1996 he filed an appeal against that decision with the Governing Board of the Fund claiming entitlement to an updated transfer value. By a decision of 27 June 1996 the Governing Board offered him the repayment of his contributions, or the assignment of the transfer value to some other insurance scheme, or the payment of a deferred pension. It gave

him until 30 July 1996 to choose; if he did not, it would infer that he had opted for the deferred pension. On 29 July he told the Fund that he took note of the deadline for reply but was reserving his right to the updating or enhancement of the transfer value or to the payment of interest thereon. By a letter of 6 August 1996 the Fund told him that since he had failed to choose he would get the deferred pension and the matter was final. But the decision he is impugning is the one of 27 June 1996.

Receivability

10. The Organization submits that on two grounds his complaint is irreceivable.

11. Its first plea is that the impugned decision causes him no injury. He was offered assignment of the transfer value at the same time as the other two options and by failing to choose in time he tacitly consented to payment of the deferred pension.

12. The plea fails. When the decision of 4 March 1996 granted him the deferred pension he appealed to the Governing Board of the Fund claiming what he called the "updating" of the transfer value. And in acknowledging the Board's exceptional offer of 27 June 1996 to pay him that value he said he was "reserving" the right to claim the updating or enhancement of the sum or the payment of interest thereon. The Fund's letter of 6 August 1996 confirming the terms of its Governing Board's decision was an obvious rejection of that "reservation". Since on that account alone the impugned decision caused him injury his complaint is receivable.

13. The Organization's second plea is about his claim to the payment of interest on the transfer value at the prevailing rates as from 9 March 1979. It argues that he never made any such claim before filing his complaint.

14. Again the plea fails on the evidence. Although before appealing to the Governing Board of the Fund the complainant spoke only of "updating" the transfer value his response to the decision of 27 June 1996 was more explicit: he claimed not just the updating and enhancement of the sum but also interest thereon. Moreover, he explained in his letter of 29 July 1996 what he meant by "the present figure of the transfer value", the term he had used in the second point (b) of his letter of 30 April 1996 to the Board: "the transfer value plus interest". The conclusion is that, although before filing this complaint he had not formally claimed the payment of interest at the

prevailing rates on the transfer value, he did so in his correspondence with the Fund.

The merits

15. So the material issue is whether the impugned decision of 27 June 1996 should be quashed. It is common ground that the complainant was offered the three options stated by the Fund. The decision gave him that choice or renewed it: he was to be granted certain benefits - in the amounts stated - in three contingencies. Its terms are indeed a plain offer from the Board of three distinct options to choose from.

16. The Fund had to set a deadline for his choice so that it could determine his entitlements. He objects that the time was too short. In view, however, of the great lapse of time since he had left the Organization, it was only reasonable to allow him just a short deadline. Besides, he never applied for more time.

17. The terms of the options offered to him were also in line with the material rules. The option of withdrawing his own contributions arose under the old rules — Article 43 of the 1967 Regulations and Article III 1.02 of the 1986 Rules — but was plainly of no interest to him. Article II 1.13 of the 1986 Rules reads:

> "Where the member has ten or more years of service, he shall have the choice between a deferred retirement pension, and payment into a national Social Security pension scheme, and/or into a private insurance scheme offering comparable guarantees."

That is just what the impugned decision offered to the complainant.

18. The complainant says that the benefit is less than what he asked for should he choose assignment to some other social insurance scheme. What he wanted was the "updating" of the amount as from the date of his leaving CERN, for example by the payment of interest. The impugned decision does not grant him that but offers instead only the original figure of the transfer value. What that means is clear in the light of the claim that he put to the Fund and of comparison with the first option, which did include interest.The Organization has indeed confirmed as much in its pleadings to the Tribunal.

19. The complainant submits that the refusal of interest runs counter to the widespread practice of social insurance schemes, to the legislation of the host countries of CERN, and to Article 21 of the Agreement concluded between Switzerland and CERN. It would, too, unjustly enrich the Fund to the participant's detriment. The Organization replies that there is no such

practice. It says that it is bound only by the provisions of the Fund's rules, which do not prescribe the payment of interest on the transfer value. Its consistent practice is indeed not to pay interest thereon, and it asks the participant to choose quickly so that there will be no risk of serious loss.

20. The complainant's claim draws some support from Section 2(3) of the Swiss Federal Act on Unrestricted Transfer (RS 831.52). But the Act does not apply to the CERN Pension Fund and neither may any such obligation be inferred from Article 21 of the Agreement between Switzerland and CERN, which allows merely the possibility of "affiliation to Swiss insurance schemes for those of its staff members who are not covered by equivalent social insurance by the Organisation itself". Moreover, the complainant has not adduced any proof of his contention. The conclusion on the evidence must be that there is no general rule requiring the Fund to pay interest on the transfer value. So the Fund was free to rely on the text of its own Rules, which do not expressly provide for interest, and on consistent practice. The refusal of interest also draws support from the fact that the transfer value will ordinarily be assigned quite promptly so that the participant suffers no serious injury.

21. In the light of the foregoing the impugned decision shows no flaw and the challenge to the decision of 27 June 1996 must therefore fail. Any decision taken by the Organization in accordance with that decision is likewise beyond challenge.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

MELLA CARROLL E. RAZAFINDRALAMBO EGLI

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-THIRD SESSION

In re Bousquet (No. 2), Gourier and Vollering (No. 11)

Judgment 1663

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Karl Bousquet, the complaint filed by Mr. Philippe André Gourier and the eleventh complaint filed by Mr. Johannes Petrus Geertruda Vollering against the European Patent Organisation (EPO) on 28 June 1996, the EPO's single reply of 30 October 1996, the complainants' joint rejoinder of 17 February 1997 and the Organisation's surrejoinder of 21 April 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Considering the applications filed to intervene in Mr. Bousquet's complaint by:

M.J.J.B. Beitner
M. Ludi
J.-B. Ousset

Considering the applications filed to intervene in Mr. Gourier's and Mr. Vollering's complaints by:

F. Blondel
C. Brénéol
F.J. Chambonnet
B. Cohen
G.I.L.C. Cousins-Van Steen
J.P.N. De Can
H.S.A. Dockhorn .
C. Fournier
C. Ginoux
R.E. Goovaerts
B.D. Granger
S. Grewel
I.M. Kagermeier
G.H.J. Mollet
D.F. Salvador
J.M. Skelly
C.H.S. Wolf

Considering the EPO's observations of 15 May 1997 on those applications;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The European Patent Office, the EPO's secretariat, has for several years had the status of "observer" in the system* of the "coordinated" European organisations. The EPO's Administrative Council used to adjust the pay of staff, in accordance with Article 64(6) of the Service Regulations, on recommendations from the Co-ordinating Committee of Government Budget Experts of the coordinated organisations.

By a decision of 8 December 1988, CA/D 20/88, the Council approved a procedure for adjustment that was "adapted from that of the 159th and 212th reports of the Co-ordinating Committee of Government Budget Experts". As amended by the Council Article 64(6) now reads:

> "The remuneration of the permanent employees shall be subject to periodic review. It shall be adjusted by the Administrative Council in accordance with a procedure adopted by that body, account being taken, so far as applicable to that procedure, of recommendations by the Co-ordinating Committee of Government Budget Experts."

The procedure of adjustment is based on two notions. One of them, dubbed "parallelism", is that pay at the EPO should keep in line with pay in the main government departments of the seven member States that are taken for the sake of comparison. The other notion is the need to ensure equality of purchasing power in staff pay. Parallelism requires the use of an international index** of prices in each country and a "specific indicator".*** Parity of purchasing power means that, once the scales of pay at the duty station taken as "the basis" for the system have been set, the scales in each of the other member countries have to be reckoned so as to ensure that staff in like professional and family circumstances have the same purchasing power, whatever the country where they are serving or have retired. The coefficients of purchasing power which are used to work out the scales, and the international price index for Germany, come from a unit known as the Inter-Organisations Study Section on Salaries and Prices (IOS). The coordinated organisations set up that unit and it is affiliated to the Organization for Economic Cooperation and Development. The city taken as the point of comparison for the whole system — the so-called "reference city" — is Brussels.

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* The system includes the North Atlantic Treaty Organization (NATO), the Organization for Economic Cooperation and Development (OECD), the Council of Europe, the European Space Agency (ESA), the Western European Union (WEU) and the European Centre for Medium-Range Weather Forecasts (ECMWF).

** This index gauges the rate of inflation in the country by reference to a "basket" of consumer items commonly bought by international civil servants.

*** The indicator represents the weighted average of real pay in the countries taken for the sake of comparison.

The Co-ordinating Committee of Government Budget Experts adopted its 212th report on 14 November 1985. The report says in paragraph 16 that: "While they are only calculated in principle once every four years, purchasing power parities are updated at each 1st July". In a report of 12 February 1993 the Co-ordinating Committee on Remuneration recommended setting new parities as from 1 July 1992. The adjustment meant rises of 4.1 per cent for Germany and of 7.3 per cent for the Netherlands.

On 11 June 1993 the Administrative Council of the EPO adopted proposals that the President of the Office had put to it in CA/29/93. That paper said:

> "... there is no parity for Munich — this city being at the centre of our remuneration system — and, for that reason, the Munich pay scales are not changed. Consequently, in order to maintain equality of purchasing power between Munich and the countries where parities will have to be corrected, the figures for Brussels, used by the coordinated organisations must be reduced by the adjustment (4.1 per cent), established for Munich."

The upshot was that there was no adjustment for Munich but, by application of the specific indicator — which was -0.1 per cent — one of 3.1 per cent for The Hague as from 1 July 1992.

The Office then made an administrative blunder. On 26 June 1993 it paid its staff at The Hague various allowances at rates that were 7.3 per cent higher. In July the Director of Staff Policy sent out a notice to staff at The Hague to say that the rise should have been only 3.1 per cent and that the sums overpaid would be docked from pay for July 1993.

Mr. Bousquet serves the Organisation at Berlin as an examiner of patents. Mr. Gourier and Mr. Vollering, who are also examiners, are at The Hague. On 6 September Mr. Gourier and Mr. Vollering each lodged two "complaints" with the President against the Council's decision of 11 June, as reflected in their pay slips for June 1993. In the first they asked him to apply to them as from 1 July 1991 scales that took account of the new parities. In the second they asked him more particularly to keep on paying as from 1 July 1993 the sums made over in allowances in June. On 23 September Mr. Bousquet too challenged the Council's decision of 11 June 1993 and asked to have his salary put up by 4.1 per cent as from 1 July 1991.

In report 22 of 28 May 1993 the Coordinating Committee on Remuneration had adopted a new procedure for adjusting pay as from 1 July 1993. Appendix 4 to the report said in point 1.2 that parities of purchasing power were in part to be revised each year and for the rest to be linked to indices of prices of the relevant consumer items.

The President put to the Council a report dated 30 November 1993 on the adjustment of pay as from 1 July 1993. It explained that for the coordinated organisations the international price index supplied by the IOS had been replaced by a new index described as "implicit". The new one was worked out from the old international index, had a partial parity component and took Brussels as the "reference city". Brussels — the report went on — was obviously irrelevant to any adjustment of basic pay for EPO staff in Germany. For Germany it was Munich, and not Brussels, that mattered most; so the scales had no "parity" component.

On 18 November 1993 the IOS had let the Office have an index for Munich. The Office called it "pure", meaning thereby that the IOS had removed any reference to coefficients of purchasing power parity for Germany.

On 9 December the Council adopted the President's proposals in his report of 30 November for the scales to apply as from 1 July 1993. The "pure" international index that the EPO was using for Germany brought a rise of 4.3 per cent in pay, whereas the index used by the coordinated organisations yielded one of 6.7 per cent. The President said that for the Netherlands the outcome was a fall of 1.3 per cent.

On 14 February 1994 Mr. Bousquet again put a "complaint" to the President objecting that his pay slip for December 1993 showed a rise of only 4.3 per cent in line with the Council's decision of 9 December 1993, whereas the rise that applying the coordinated organisations' index would have brought was, by application of the specific indicator, 6.6 per cent. He asked the President for a 2.3 per cent rise as from 1 July 1993. He also said that the parity adjustment of 4.1 per cent should have applied as from 1 July 1992. On 3 March 1994 Mr. Vollering and on 8 March Mr. Gourier each lodged another three "complaints" with the President. They asked him to raise pay by 4.1 per cent as from 1 July 1992, to correct the amounts of allowances due as at 1 July 1993 and again to raise pay as from the same date by a percentage they did not state.

In a paper dated 22 April 1994 the President proposed to the Council what he saw as clearer arrangements for applying Article 10 of the procedure. His suggestion was to explain the statistical data to be used to ensure that the adjustments made by the Office continued, as Articles 6 and 10 of the procedure required, to abide by the provisions of the 212th report of the Co-ordinating Committee of Government Budget Experts, despite the changes made since 1992 by the coordinated organisations. On 8 June 1994 the Council approved as from 1 July 1994 the President's proposals for amending Article 10.

In a unanimous opinion of 6 July 1995 the Appeals Committee held that Brussels was still "the heart of the parity system". It recommended raising pay for staff at Munich by 4.1 per cent as from 1 July 1992. In another report, of 15 November 1995, it recommended a like rise in pay for staff at Berlin, The Hague and Vienna. On the same day it issued several other reports. In one it recommended raising pay at The Hague by 2.3 per cent and making corresponding rises in pay everywhere else but Germany as from 1 July 1993. In another report it recommended disallowing the claim to a 2.3 per cent rise for staff in Munich as from 1 July 1993. But it held that the administration had not properly followed the arrangements in the 22nd report of the Coordinating Committee on Remuneration for reckoning the international price index for Germany at that date. So it recommended taking a new decision in accordance with the 212th report of the Co-ordinating Committee of Government Budget Experts. In yet another report the Appeals Committee recommended allowing the appeals against recovery of sums overpaid.

The decisions on pay brought a surge of protest from the staff. The Council held its 60th Session from 4 to 8 December 1995. It bade management start talks on 1 January 1996 with staff representatives to sort out the dispute over pay once and for all. In a communiqué, No. 2 of 1 February 1996, the President offered to make good half the loss of pay that applying the method in force since 1988 had entailed as from 1 July 1992 and thenceforth to take Brussels again as the "reference city" for the system. The upshot was that the President and the chairman of the headquarters staff committee put out a joint statement on 15 February 1996 and the Council endorsed the resulting draft decision on 8 March. A single lump-sum payment was to be made against past losses, the scales were to be adjusted as at 1 January 1996, and Brussels was again to become, as from 1 July 1996, the "reference city" for reckoning parities in purchasing power.

A circular of 2 April 1996 from the Vice-President of Directorate General 4 told the staff that the appeals had failed. That is the impugned decision.

B. The complainants have two pleas: breach of the procedure of adjustment and of Article 64(6) of the Service Regulations, and breach of the rule against retroactivity.

First, they submit that Brussels was still the "reference city", i.e. the duty station to be taken for the sake of comparison. In reckoning pay as at 1 July 1992 and as at 1 July 1993 the EPO ignored the index of the cost of living in Brussels. It thereby dropped the method it had itself adopted on 8 December 1988. The right course would have been to take the international index of consumer prices used by the coordinated organisations and the purchasing power coefficient worked out for Munich from the IOS's figures, which treated Brussels as the "reference city".

The complainant's second plea is that the decisions taken in June and December 1993 not to apply in full the adjustments due as from 1 July 1992 and as from 1 July 1993 were tantamount to retroactive amendment of the policy adopted in 1988. No such amendment should have come into force before 1 July 1994.

The complainants are asking the Tribunal to quash the decision of 2 April 1995 and order the EPO to pay them as from 1 July 1992 a 4.1 per cent rise in salary "attributable to the inclusion of the Brussels-Munich parity as determined for that date by the [IOS]". Mr. Bousquet wants the Organisation to pay him as from 1 July 1993 a 2.3 per cent rise "attributable to the inclusion in full of the international 'implicit' index for Germany as determined at that date by the IOS" and to pay him in full and retroactively from the dates of entry into force — as from 1 July 1994 and as from 1 July 1995 — such adjustments as are attributable to application of the implied" index determined yearly by the IOS for Germany. Mr. Gourier and Mr. Vollering seek further increases of 2.3 per cent "attributable to the inclusion in full of the cost-of-living index for the Netherlands" and such later adjustments as are attributable to application of the cost-of-living index determined yearly by the IOS for the Netherlands. Mr. Gourier and Mr. Vollering ask the Tribunal to declare that the EPO acted in breach of Article 88 of the Service Regulations on the recovery of undue payments. They claim payment of interest at the rate of 10 per cent a year on the amounts withheld, and costs.

C. In its reply the EPO asserts that according to several technical papers written in support of its case in the internal appeal proceedings Munich has since 1988 been the point of comparison for the pay of EPO staff. The compromise of March 1996 replaced Munich with Brussels as from 1996.

The defendant denies breaking the rule against retroactivity or departing from any of the rules. It submits that the Office was right to recover promptly the sums overpaid in allowances in June 1993.

D. In their rejoinder the complainants maintain that whereas Brussels serves the purpose of statistical comparison Munich matters just for the choice and presentation of pay scales. They observe that Article 6 of the procedure refers to what the Co-ordinating Committee of Government Budget Experts said in its 212th report about the reckoning of parity coefficients and price indices. They infer that the nub of the method consists in relating purchasing power parities to Brussels. The EPO chose to have the IOS supply the relevant statistics. They press their other pleas.

E. In its surrejoinder the Organisation submits that the distinction that the rejoinder draws between Brussels and Munich is a "mere fiction". Article 6 of the procedure makes an express derogation from the 212th report: it says that the coefficients are "re-calculated on the basis of Germany (Munich = 100)". Having the IOS supply data for the purpose of applying the procedure does not make Brussels the relevant point of comparison.

CONSIDERATIONS

1. Until 30 June 1988 the scales of staff pay for the EPO were the same as for the system of "coordinated" organisations. The Organisation had the status of an observer and was applying for full membership. The system takes Brussels as the point of comparison. The scales of pay for staff

in Brussels serve as the basis for working out the scales in other countries, coefficients being applied to give pay the same purchasing power whatever the duty station.

In an edition dated January 1982 Article 64(6) of the Service Regulations read:

> "The remuneration of the permanent employees shall be subject to periodic review and shall be adjusted by the Administrative Council taking account of the recommendations of the Co-ordinating Committee of Government budget experts of the Co-ordinated Organisations."

In 1988 the EPO adapted the system of the coordinated organisations to its own needs: it would bring pay into line with its own career system, adjust pay for all grades so as to have a rational structure allowing a smooth shift from one grade to another, and fit in a new grade, A4(2).

Its Administrative Council then amended Article 64(6) to read:

> "The remuneration of the permanent employees shall be subject to periodic review. It shall be adjusted by the Administrative Council in accordance with a procedure adopted by that body, account being taken, so far as applicable to that procedure, of recommendations by the Co-ordinating Committee of Government Budget Experts."

On 8 December 1988 the Council approved the text of a procedure for the adjustment of salary The title was: "Procedure, adapted from that of the 159th and 212th reports of the Co-ordinating Committee of Government Budget Experts, for adjusting the remuneration of permanent employees of the European Patent Office". The text reads in part:

> "CHAPTER II - REVIEW OF BASIC SALARIES
>
> Article 3
>
> 1. With effect from 1 July of each year and on the basis of comparable grades, the basic salaries of permanent employees working in Germany will be adjusted by an amount equal to the percentage change over the past 12 months in the international price index as calculated in that country, corrected upwards or downwards by the applicable weighted average of the real percentage changes in net remuneration levels in the central government services of the reference countries over the same period.
> 2. This percentage adjustment applies to basic salaries in force in Germany at 1 July of the previous year.
> 3. Remuneration levels of civil servants in central government services and the national cost of living indices are supplied by the relevant Member States' civil services; the international price indices and

> coefficients of purchasing power are supplied by the Inter-Organisations Study Section.
>
> ...
>
> Article 5
>
> To obtain the basic salaries applicable on 1 July in countries other than Germany, the new basic salaries applicable to the staff working in Germany are multiplied by the coefficients of purchasing power parity which ensure that all employees in the same grade and step have the same change of purchasing power.
>
> Article 6
>
> The coefficients of purchasing power parity and consumer price evolutions are calculated in accordance with the procedure laid down in the 212th report of the Co-ordinating Committee of Government Budget Experts and re-calculated on the basis of Germany (Munich = 100).
>
> ...
>
> CHAPTER V - CONSUMER PRICE INDICES AND COEFFICIENTS OF PURCHASING POWER PARITY
>
> Article 10
>
> The change in the cost of living referred to in articles 3, 6, 7 and 9 and the application of the coefficients of purchasing power parity referred to in Articles 3, 5 and 6 are determined on the basis of the international price indices and coefficients of purchasing power parity drawn up in the Member States in accordance with the recommendations of the 212th Report of the Co-ordinating Committee of Government Budget Experts."

Annex II of the 212th report sets out the statistical methods used by the Inter-Organisations Study Section on Salaries and Prices (IOS), a body set up by the coordinated organisations. It says:

> "III. Purchasing Power Parities
>
> 8. The Committee could support the recommendation of the Working Party that Brussels should remain the reference town [sic] and that the Fisher method should be used for the calculations.
> 9. In order to establish purchasing power parities between Brussels and the various duty stations involved, it is necessary to:
>   (i) collect representative commodity prices in Brussels and each of the duty stations,
>   (ii) weight these prices in accordance with the consumption pattern of the population concerned ...,
>   (iii) subsequently update these parities.
>
> ...

> IV. Co-operation between the European Communities and the Coordinated Organisations
>
> 16. The international index for Belgium ... is calculated by the SOEC [Statistical Office of the European Communities] and approved by the Belgian Ministry of Economic Affairs ... It is used by the European Communities and the Co-ordinated Organisations. The international index for France is calculated by the INSEE [National Institute for Statistics and Economic Research] and used by the European Communities, Co-ordinated Organisations and the United Nations. The international indices for Germany, Italy, the Netherlands, Norway and the United Kingdom are calculated by the Inter-Organisations Section on the basis of data provided by national statistical offices ..."

The gist of the method adopted in 1988 was that the IOS was to supply information on international price indices and coefficients of purchasing power for Brussels. The EPO used that information to recalculate the scales for Munich and therefrom to work out the scales for the other EPO duty stations.

2. The EPO says that it followed the new procedure until 1992, when it introduced a method of its own. It explains that that method consisted in using statistics that came, not from the IOS for the purpose of recalculating the Munich scales, but from the statistics offices of the state of Bavaria or of Germany as a whole. The Organisation found the new method more reliable than taking the new "implicit" international price index which the coordinated organisations were using instead of the old one. The method made for savings, too, on rises attributable to inflation in the cost of living.

The President put a paper — CA/29/93 — to the Administrative Council at its session of June 1993 about the adjustment of pay as from 1 July 1992. The paper proposed using new coefficients of purchasing power parity which the Coordinating Committee on Remuneration had approved. It said:

> "In accordance with Articles 5 and 6 of the procedure ... these coefficients, using Germany as a reference, apply to the Office."

It observed that the coordinated organisations had made the following adjustments as from 1 July 1992, taking Brussels as the basic point of comparison:

Country	Reference city	New parity	Old parity	Change
Germany	Munich	0.0515	0.04948	+ 4.1%
...				
Netherlands	The Hague	0.05500	0.05127	+ 7.3%

The paper commented that in accordance with Articles 5, 6 and 10 of the procedure the new parities needed to be taken into account as they reflected local trends and to be brought into line with the EPO's own reference city, which was Munich. The paper explained that since the EPO was taking Munich as the reference city only the figure for Munich should serve in working out the rates of adjustment for the other duty stations. The rate of adjustment for The Hague would be 3.1 per cent. The Munich figures were adapted regularly and needed no further amendment: should any slight adjustment prove necessary, the President would make proposals in the light of the Office's financial situation.

On 11 June 1993 the Administrative Council approved the President's proposals and decided:

> "*Article 1*
>
> Note has been taken of the report of the President of the European Patent Office on the implementation of the new purchasing power parity coefficients, the proposals for which have been approved.
>
> *Article 2*
>
> Basic monthly salary scales in tables 3 and 4 of Annex III to the Service Regulations are replaced by the corresponding scales contained in the tables appended to this decision.
>
> *Article 5*
>
> Should the adjustment arising from this decision result in a scale or an amount for indemnity or allowance lower than that in force in July 1992, such negative adjustment shall be reflected in adjustments after 1 July 1992.
>
> *Article 6*
>
> This decision ... shall apply as from 1 July 1992."

Application of the new method resulted in no increase at all for Germany and one of 3.1 per cent for the Netherlands. Several documents observed that the method made for cuts in costs.

3. Many staff at Munich, Berlin and The Hague were put out to hear that they would not be getting the same adjustments as the staff of the coordinated organisations.

In June 1993 the EPO paid staff at The Hague allowances at a rate that was 7.3 per cent higher. Shortly afterwards, however, it told them that it had mistakenly paid them too much and would be recovering the sums overpaid. The staff objected on the grounds that the conditions for recovery under Article 88 of the Staff Regulations were not met.

Many staff members appealed against the Council's decision of 11 June 1993 on adjustment as it was reflected in their pay slips.

4. On 9 December 1993 the Council adopted a decision on the President's proposal on the adjustment of staff pay as from 1 July 1993. The adjustment was worked out from the figures for June 1993. To make for parity in purchasing power the EPO got from the IOS what it calls a "pure" international price index, a corrected version of the "implicit" one used by the coordinated organisations.

Staff lodged further internal appeals against the pay slips they got as a result of that decision.

On 8 June 1994 the Council made amendments to Articles 6 and 10 of the procedure adopted in 1988. The amended text reads:

> "*Article 6*
>
> The coefficients of purchasing power parity and consumer price evolutions are calculated in accordance with the procedure laid down in the 212th report of the Coordinating Committee of Government Budget Experts and the interpretation thereof in Chapter V of the procedure and re-calculated on the basis of Germany (Munich = 100)."

Article 10 comes under Chapter V, which is headed "Consumer price indices and coefficients of purchasing power parity". It says in (1) that the change in the cost of living referred to in Articles 3, 6, 7 and 9 and the application of the coefficients of purchasing power parity referred to in Articles 3, 5 and 6 are determined on the basis of the international price indices and coefficients of purchasing power parity drawn up in the Member States in accordance with the recommendations of the 212th Report of the Co-ordinating Committee of Government Budget Experts. Article 10(2) says that only rents actually paid by EPO staff will count in evaluating changes in rent used to calculate international price indices. Article 10(3) provides that the purchasing power parities shall be updated each year as at

1 July by multiplying the purchasing power parity by the percentage change in the international or the relevant national consumer price index and dividing the result by the percentage change in the international price index for Germany. Article 10(4) states that parities for Austria and the Netherlands will be updated on the strength of the international index and that for other countries where pensioners are resident the national index will be used. Lastly, 10(5) says that for Austria the parity resulting from the recalculation as at 1 July 1994 and communicated by the IOS shall be regarded as the purchasing power parity existing at that date.

In December 1994 the Council adopted, on the strength of the procedure as amended in June, an adjustment to pay for the period from 1 July 1994 to 30 June 1995.

Again appeals came from the staff.

5. The appeals went to the Appeals Committee. In reports of 6 July and 15 November 1995 it unanimously recommended that the President allow them.

To have done with the disputes the President and the staff representatives found a compromise. A proposal that the Council approved on 8 March 1996 was put to each member of the staff, and most of them accepted it. The gist of it was that Brussels was to serve as the reference city for the purpose of adjustment and pay was to go up as from 1 January 1996 by 3.9 per cent for Berlin and Munich and by 6.3 for The Hague. Lump sums would also be paid that were equivalent to half the amounts that would be due if the Appeals Committee's recommendations as to the reference city were followed. That meant letting staff at Munich, Berlin and The Hague have retroactive payment of 2 per cent of net pay as from 1 July 1992. Staff at The Hague would also get another rise of 2.1 per cent in net pay as from 1 July 1993. The compromise did not apply to anyone who declined it.

The Vice-President of Directorate General 4 informed the staff by a circular of 2 April 1996 that the President had rejected the internal appeals.

6. Three permanent employees, each acting for himself, have lodged these complaints impugning the President's decision. They are challenging the change made in June 1993 that consisted in dropping the method which had been adapted from that of the coordinated organisations and which had taken Brussels as the starting point of comparison. The impugned decision and their claims are about the adjustment of pay for the periods from 1 July

1992 to 30 June 1993 and from 1 July 1993 to 30 June 1994. Pay since 30 June 1994 is not at issue.

The Organisation has put in a single reply and the complainants a single rejoinder. The cases may be joined since they arise from the same facts and raise the same issues.

The nub of the complainants' case is that the change of method offended against Article 64(6) of the Service Regulations and against the rule that no administrative decision that may cause injury should be retroactive. They cite precedent. Mr. Gourier and Mr. Vollering, who are stationed at The Hague, have a subsidiary plea: if the new method were upheld recovery of the sums overpaid in allowances would be in breach of Article 88 of the Service Regulations.

In the Organisation's submission there is only one material issue: should the reference city for the relevant periods have been Brussels or Munich? Its answer is that, quite obviously, in 1988 it replaced Brussels with Munich, where its headquarters are, for the purpose of adjusting pay at its other duty stations. It denies breach of the rule against retroactivity on the grounds that there were no new rules: the President was just applying rules already in force. In answer to the subsidiary plea of the complainants stationed at The Hague the defendant says that recovery of the sums overpaid in allowances is not in breach of Article 88. To anyone who got those sums the mistake was glaring: everyone had been told that the rise would be 3.1 per cent and the sums paid were plainly higher.

7. Adjustment serves two purposes: one is to make for equality of purchasing power by reference to trends in consumer prices; the other is to have "parallelism" in pay between the EPO and national civil services by applying a weighting factor known as the "specific indicator" so as to adjust upwards or downwards.

The only point at stake is whether parity of purchasing power was observed. What, in other words, was the proper basis for adjusting the complainants' pay to the cost of living from 1 July 1992 to 30 June 1993 and from 1 July 1993 to 30 June 1994?

Both sides rightly acknowledge that to work out pay for other duty stations the Organisation has since 1988 been taking Munich as the reference city ("Munich = 100") and reckoning the scales according to differences in purchasing power between Munich and the host countries, the purpose being to preserve parity. The complainants are not challenging the rates of adjustment applied to the Munich scales for the other duty stations. What they do challenge is the method of setting the Munich scales, precisely because of the effect on pay at the other duty stations. In their submission the material issue is whether Brussels was what they call the "statistical reference city" for the EPO, as it was for the coordinated organisations, and they maintain that it was. The Organisation reports that Munich has been the only reference city since 1988. In 1989-92 it used to take the international price indices which it got from the IOS and which the coordinated organisations were also using. In 1992-93 it switched to its own method of reckoning trends in purchasing power at Munich and accordingly granted no increases. In 1993-94 it went back to a "pure" international price index which it got from the IOS but which the coordinated organisations had stopped using. Is the method it followed in 1992-93 and in 1993-94 in line with the one it had approved in 1988 and so with the new text of Article 64 of the Service Regulations and the procedure then adopted?

8. The Organisation's first plea is that Munich has been the only "reference city" since the change of method in 1988. In its submission the upshot is that it was free to set the Munich scales on its own and to disregard the IOS's figures for Brussels. Articles 3, 5 and 6 of the procedure are — it argues — conclusive, and they derogate from the *renvoi* to the 212th report, which took Brussels as the reference city.

The plea fails. According to the 1988 version of Article 64(6) of the Service Regulations adjustments are to be made "in accordance with a procedure adopted" by the Council, "account being taken, so far as applicable to that procedure, of recommendations by the Co-ordinating Committee of Government Budget Experts". The plain meaning is that, "so far as applicable" and in keeping with the EPO's own needs, the Organisation is to follow those recommendations. There is no intent of derogation from the system in any other respect.

Article 3(1) of the procedure stipulates that pay in Germany "will be adjusted by an amount equal to the percentage change over the past 12 months in the international price index as calculated in that country"; article 3(3) says, among other things, that "international price indices and coefficients of purchasing power are supplied" by the IOS; and Article 6 that "The coefficients of purchasing power parity and consumer price evolutions are calculated in accordance with the procedure laid down in the 212th report of the Co-ordinating Committee of Government Budget Experts and re-calculated on the basis of Germany (Munich = 100)". Article 10 too is relevant. The heading of the text is "Procedure, adapted from that of the 159th and 212th reports of the Co-ordinating Committee of Government Budget Experts, for adjusting the remuneration of permanent employees of the European Patent Office." Applying the 212th report means that Brussels is the statistical reference city. Indeed it is such not just for the coordinated organisations but for the European Union and United Nations bodies as well. If, as the defendant says, Articles 3, 5 and 6 of the procedure amounted to derogation, then the procedure would at the very least have had to explain how otherwise to adjust the pay of staff in Munich in line with the two cardinal notions of parity and parallelism. It does not.

The President put to the Council a paper — CA/29/93 — about pay as from 1 July 1992. Though the paper acknowledged that the IOS's new parity figures reflected cost-of-living trends, it still proposed adjustment to bring them into line with the EPO's own "basic reference point". It did not explain how that was to be done; it merely gave to understand that the proposal was linked to the Organisation's finances. Nor was any satisfactory explanation later forthcoming on the subject for either of the two periods, 1992-93 and 1993-94. Even though the EPO took Munich as the point of comparison for the other duty stations, it was still perfectly able to work out the Munich scales from the IOS's figures for Brussels (taking Munich as "=100"). One factor of relevance in construing a rule is the way it has been understood and applied in good faith over a long period. From 1988 until the adjustment made as from 1 July 1992 the EPO took the IOS's figures. Indeed it stood to gain in two ways from doing so. For one thing, the unit of the coordinated organisations was offering a reliable service and full documentation, which the EPO did not have and which it says it was too small to secure for itself. The other advantage was that in adjusting pay it was keeping in the mainstream of international organisations, subject only to a few exceptions to answer it own needs.

The conclusion is that the rules that the EPO made in 1988 did not allow it to depart from the method of adjusting pay on the strength of the IOS's cost-of-living figures.

9. The Organisation further pleads that in 1992 it had to stop using the IOS's index and start reckoning its own cost-of-living figures. The reason was that the coordinated organisations had given up that index in favour of a weighted one, described as "composite" or "implicit", which

was not at all the international index provided for in the EPO's procedure. It had to make good the loss of the old index and itself get hold of other statistics of price movements so as to work out the rates of adjustment. It says they came from German or Bavarian statistical services.

The coordinated organisations fine-tune adjustments every few years on the strength of the findings of detailed surveys of the cost of living for civil servants. For the years in between, adjustments used to hinge on general cost-of-living indices; but to make for greater accuracy the organisations decided to carry out smaller surveys and use the findings to work out a fraction of the full rate of adjustment. Hence the implicit index.

The President put a paper on the subject to the Council at its meeting in November 1992. Like the EPO's advisory group on pay, he said that that system had been working well. He proposed making no change in the IOS's practice of converting the international to the implicit index. The Council agreed. In 1993, however, President and Council changed tack on the grounds of drawbacks over using the implicit index. One was the risk of letting through too big increases which would have been hard to correct *ex post facto*.

(a) Did it really run counter to the procedure for the EPO to use the IOS's implicit index?

There is no need to answer that question. The procedure left the Organisation discretion in the matter, and it did not actually decide whether it wanted to keep to the old sort of international index insofar as it never invoked the choice in support of its refusal of an increase in pay.

(b) Yet the Organisation does fail to show that it could not have got from the IOS an international price index established as in 1988.

It says that for the 1993-94 exercise it got from the IOS a "pure" international index, which was worked out easily enough. So presumably it would have been able, however belatedly, to get a pure index for 1992-93 as well.

The conclusion is that there were no proper grounds for departing from the 1988 procedure.

10. The Organisation says that there was no appreciable change in the cost of living in Munich to warrant adjustment. That seems implausible. Indeed the paper that the President put to the Council does not bear it out. The reasons that the paper offers relate mainly to pay policy, and it says that

there may be a correction later if the Organisation's finances so allow. The rates of increase approved by the coordinated organisations and by the European Union for 1993-94 suggest that according to the relevant indices the cost of living in Munich did then go up. So do the terms of the compromise later concluded by the Organisation with most of its staff. Applying a "pure" index for 1992-93 too would probably have yielded a different result.

11. By failing to apply the 1988 procedure in 1992-93 the Organisation infringed the staff's right to the adjustment due thereunder. And its decision affected the one about pay in 1993-94 because it set the figures that afforded the basis for subsequent adjustment.

12. Applying the wrong method put the staff at serious risk of not getting the adjustment they were entitled to.

In that respect they are in much the same position as the staff of the European Southern Observatory as to the failure to adjust pay for 1992-93: see Judgments 1419 (*in re* Meylan and others) and 1420 (*in re* Dekker and von der Lühe), which apply by analogy.

The impugned decision must therefore be set aside. Since the Organisation has not yet worked out the consequences of properly applying the 1988 procedure as from 1 July 1992 in accordance with Article 64(6) of the Service Regulations, the cases must be sent back for new decisions to be taken in the light of this judgment. Interest will be payable on any sums due as from the due dates.

13. Since the complainants' main plea about the rate of adjustment is upheld, there is no need to take up their subsidiary plea about the recovery of sums overpaid.

14. Having largely succeeded, the complainants are awarded costs.

15. Insofar as the interveners are in the same position in fact and in law as the complainants they shall have the same rights as the complainants, save as to costs.

DECISION

For the above reasons,

1. The impugned decision of 2 April 1996 is set aside.
2. The cases are sent back to the Organisation so that it may take new decisions accordingly, in the complainants' and interveners' favour, as from 1 July 1992.
3. The Organisation shall pay the complainants a total of 10,000 German marks in costs.
4. All the other claims of the complainants and the interveners are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

WILLIAM DOUGLAS E. RAZAFINDRALAMBO EGLI

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-THIRD SESSION

***In re* Cook (No. 7) and Rosé (No. 2)** **Judgment 1664**

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mr. Steven Derek Cook and the second by Mr. Alain René Pierre Rosé against the European Patent Organisation (EPO) on 28 June 1996, the EPO's single reply of 30 October 1996, the complainants' joint rejoinder of 4 February 1997 and the Organisation's surrejoinder of 14 April 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and pleadings may be summed up as follows:

A. The European Patent Office, the EPO's secretariat, has for several years been an "observer" in the system of the coordinated European organisations[*]. The pay of the Office staff used to be adjusted by the EPO's Administrative Council, according to Article 64(6) of Service Regulations, on recommendations by the Coordinating Committee of Government Budget Experts of those organisations.

By decision No. CA/D 20/88 of 8 December 1988 the Council approved a procedure which it adapted from that of the coordinated organisations for adjusting the pay of the Office staff. Article 64(6) as amended by the Council says:

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[*] The system includes the North Atlantic Treaty Organization (NATO), the Organization for Economic Cooperation and Development (OECD), the Council of Europe, the European Space Agency (ESA), the Western European Union (WEU) and the European Centre for Medium-Range Weather Forecasts (ECMWF).

> "The remuneration of the permanent employees shall be subject to periodic review. It shall be adjusted by the Administrative Council in accordance with a procedure adopted by that body, account being taken, so far as applicable to that procedure, of recommendations by the Co-ordinating Committee of Government Budget Experts."

The procedure of adjustment is based on two notions. One is the need to ensure parity of purchasing power in staff pay between EPO duty stations by applying international indices of prices and coefficients. The other notion, dubbed "parallelism", is that pay at the EPO should keep in line with pay in the main government departments of the seven member States that are taken for the sake of comparison. The percentage figure finally worked out is known as the "specific indicator". It is the weighted average of civil service pay in the seven countries and its purpose is to correct variations in the international price indices.

Article 3(3) of the procedure says that the "remuneration levels of civil servants in central government services ... are supplied by the relevant Member States' civil services". Between 1988 and 1992 some of the countries gave incomplete data on pay: information from France discounted bonuses paid to civil servants over and above basic salary and the United Kingdom left out merit increments. But the Office worked out the scales from the data it did have.

Article 13 of the procedure says:

> "Should the information supplied by the civil services of the seven reference countries in accordance with Article 3 of the present procedure be corrected for a given country with retroactive effect after having been forwarded to the Office, the President shall, with the agreement of the independent experts referred to in Article 1(3) modify, as appropriate, the salary scales in force, which he will submit to the next meeting of the Administrative Council for approval.
>
> This adjustment will take effect on 1 July of the year for which it has been decided."

In 1993 the French civil service forwarded to the Office its salary scales in force at 1 July 1992 and at 1 July 1993. This time it included the bonuses. Also in 1993 the British sent the Office fuller information on salaries for the period from 1 July 1992 to 30 June 1993. Both sets of data were forwarded to the European Patent Office.

On 9 December 1993 the Administrative Council decided on the President's proposal to "adjust as from 1 July 1993 the salaries and other components of the remuneration of the staff of the Office" on the strength of all the data it had.

The complainants are employed at the EPO's Directorate-General 1 (DG1) at The Hague. On 25 February 1994 Mr. Rosé and on 10 March Mr. Cook wrote to the President objecting to their salary slips for December 1993. They challenged the reckoning of the specific indicator "particularly as regards the counting of bonuses in some countries, which has a bearing on the specific indicator applying at 1 July 1993 but also for the previous years". They asked the President to correct the salary scales in force since 1 July 1993 and, if need be, for the two previous years as well and, should he refuse, to treat their letters as appeals. The matter went to the Appeals Committee. In its report of 15 November 1995 the Committee pointed out that Article 13 of the procedure allowed retroactive adjustment and that "corrected" figures were available for 1992. It recommended allowing the appeals and taking those data into account as from 1 July 1992. By a staff circular of 2 April 1996 the Vice-President of Directorate-General 4 announced that the appeals were rejected.

B. The complainants argue that the Organisation committed a breach of Article 64(6) of the Service Regulations. In their submission all the conditions for applying that rule were met, and the refusal to do so was a departure from the procedure the EPO had itself brought in on 8 December 1988 and an offence against "parallelism". That way lay arbitrariness.

The complainants further plead breach of their rightful expectations. The staff were, they say, entitled to continuance of the same method of adjustment as part of their right to the objective and stable reckoning of pay. Besides, the Organisation owes them a duty of care and so ought to have sought more information from the two governments and taken account thereof.

They ask the Tribunal to quash the decision of 2 April 1996; order the EPO to grant them as from 1 July 1992 another adjustment of pay based on a new reckoning of the specific indicator at that date with due regard to the further information from France and the United Kingdom; and to pay them interest at the rate of 10 per cent a year on the amounts wrongfully withheld. They seek costs.

C. The EPO replies that the complaints are irreceivable insofar as they challenge the lawfulness of the specific indicator as at 1 July 1992 and the pay scales applying at that date. The Council's decision of 9 December 1993 did not provide for the payment of arrears for the previous years. It therefore merely confirmed its decisions setting pay scales for those years in disregard of the missing data. The complainants failed at the time to challenge the pay slips reflecting those scales.

The Organisation submits on the merits that it did take account of the further information from France and the United Kingdom in 1993 when it set the pay scales for 1 July 1993. As to the earlier scales, although Article 13 of the procedure allows retroactive correction, there will be none unless there has been some error. Here there was none. Although the two governments originally took the view that the further information was not generally applicable to their civil servants, yet changed their minds in 1993, they did not thereby admit to any error.

The complainants' plea about breach of parallelism is mistaken. The Organisation has consistently applied the procedure it adopted in 1988 on the strength of the available data. It also did its utmost to get the information that the governments would not supply.

D. In their rejoinder the complainants explain that they are not questioning the lawfulness of the specific indicator applied as at 1 July 1993. They challenge the Organisation's objection to the receivability of their main claim and press their pleas on the merits.

In their submission the breach of parallelism is beyond dispute. The information provided by the French Government in 1992 and 1993 on pay at 1 July 1992 was inconsistent: yet the EPO used it. The breach is evident too from comparison of the specific indicator with the British data. The idea of "error" is not in Article 13, which comes into play whenever there is "information ... corrected". The EPO was in bad faith: though it refused to take account of the further data for 1992 its earlier attempts to get them show that it knew full well it could not ensure parallelism on the strength of the information it did have.

E. In its surrejoinder the Organisation maintains that the complainants are treating the further data for 1992 as correction for that year whereas the purpose was to use them in reckoning the 1993 adjustment by comparing the two years. Article 13 does contain the notion of error, which is implied in the word "corrected".

CONSIDERATIONS

1. Until 1 July 1988 pay at the EPO was aligned with pay in the "coordinated" organisations, which regularly reviewed and adapted it.

The EPO felt that that system did not wholly meet its own needs. So in 1988 it brought in a method of adjustment which took the co-ordinated organisations' own figures but adapted them for its own purposes. Its Administrative Council accordingly amended Article 64(6) of the Service Regulations and on 8 December 1988 took a decision of which the text is headed "Procedure adapted from that of 159th and 212th reports of the Co-ordinating Committee of Government Budget Experts for adjusting the remuneration of permanent employees of the European Patent Office".

The new procedure has two aims. One is to ensure "parallelism" in pay between the EPO and the civil services of seven countries that are taken for the sake of comparison. The other is to maintain equality in the purchasing power of pay between EPO duty stations. Pay at each duty station is adjusted to the local cost of living subject to application of a "specific indicator". The cost of living is taken from international price indices, and coefficients ensure parity of purchasing power from one duty station to another. Indices and coefficients alike come from a unit set up by the coordinated organisations and known as the "Inter-Organisations Study Section on Salaries and Prices". But the indicator is worked out from data on net pay that come from government departments of the seven countries. The procedure explains how to reckon the indicator.

Article 3(3) says:

> "Remuneration levels of civil servants in central government services ... are supplied by the relevant Member States' civil services ..."

and Article 13:

> "Should the information supplied by the civil services of the seven reference countries in accordance with Article 3 of the present procedure be corrected for a given country with retroactive effect after having been forwarded to the Office, the President shall, with the agreement of the independent experts referred to in Article 1(3), modify, as appropriate, the salary scales in force, which he will submit to the next meeting of the Administrative Council for approval.
> The adjustment will take effect on 1 July of the year for which it has been decided."

2. From 1988 until 1992 there was difficulty over the figures from France, which left out bonuses, and from the United Kingdom, which omitted merit increments.

In adjusting pay as at 1 July 1989 bonuses were discounted. The reasons were stated in a note of 14 September 1989 from the Remuneration Working Group (GTR) to the President of the Office:

> "The GTR noted that the payment of category bonuses in national civil services to satisfy national pay claims created problems in establishing the exact level of national remuneration. The bonuses are not included in remuneration and so are not taken into account in the procedure. Given the extent to which bonuses are applied in certain countries (France, for example) the GTR will continue examining the matter and if appropriate, propose a way of taking them into account."

The same decision was taken on the adjustments as at 1 July 1990 and 1 July 1991.

For the adjustment as at 1 July 1992 the EPO again failed to get data on bonuses and merit increments. So it worked out the indicator on the strength of the data actually supplied, i.e. discounting French bonuses and British increments.

The staff representatives, some of whom were on the Remuneration Working Group, were quite aware of that.

On 6 August the British and on 22 September 1993 the French let the EPO have the information it had asked for on bonuses and increments to reckon pay as at 1 July 1992 and 1 July 1993.

On 9 December 1993 the Council approved a proposal from the President on the setting of pay as at 1 July 1993. The new figures took account of the further data from the two governments but there was no revision of the scales for the year before under Article 13 of the procedure.

In letters of 25 February and 10 March 1994 to the President the complainants challenged their pay slips for December 1993 on the grounds that the Organisation had failed to apply Article 13.

Their appeals went to the Appeals Committee, and on 15 November 1995 the Committee recommended allowing them. But the President rejected them on 2 April 1996.

Receivability

3. The one issue is whether under Article 13 the further information from France and the United Kingdom ought to have been taken into account retroactively as from 1 July 1992. The reckoning of the new indicator applied as at 1 July 1993 is not under challenge.

4. The Organisation argues that the internal appeals were and that the complaints are irreceivable. In its submission the complainants knew at the time of the previous adjustment that the British and French data were incomplete. Had they wished to challenge that adjustment they could and should have done so at the time and within the prescribed time limits. Their right to do so has lapsed.

A staff member has two quite distinct rights. When a decision adversely affecting him is taken, he may challenge it within the time limits on the grounds of breach of his rights. But if grounds later emerge for review he may object to any new decision, or to the lack of one, within the time limits and again on the grounds of breach of his rights.

(a) The complainants are exercising only the second of those rights. So their appeals and their complaints were timely. Whether the requirements for review are met is, however, a substantive issue.

The Organisation cites Judgment 575 (*in re* Schulz). In that case the complainant was challenging her grading after expiry of the time limit on the grounds that only then had she realised she was being discriminated against. Although the complaint was held to be out of time, there was no question of any right to review or any right to appeal against a decision on review. So the precedent is irrelevant.

If they do have such a right under Article 13 the complainants are not in bad faith in asserting it simply for having failed at the time to impugn the application of the specific indicator as at 1 July 1992. It was not clear how an appeal against the salary adjustment might fare. The Organisation itself admits in its surrejoinder that it had then only the official information from governments to go on. So it was reasonable, since Article 13 allows for review, for the complainants not to make a move until the data were complete.

On that score appeals and complaints are alike receivable.

(b) Insofar as the complaints are also challenging the decision setting the specific indicator, the issue of receivability is taken up in 7 below.

The merits

5. Are the staff entitled to an upward adjustment in pay for the year prior to the introduction of the new scale? The complainants submit that had the Organisation had in time full figures of pay from France and the United Kingdom it would have put up the pay of its own staff earlier.

What, then, does Article 13 require?

The complainants contend that the further information entailed "correcting" the earlier figures so as to give everyone higher pay; the EPO conceded as much when it set the indicator as at 1 July 1993, and indeed earlier by its very insistence on getting the information; and it has already applied Article 13 in like circumstances.

The Organisation demurs. In its submission the information was not "corrected" but simply supplemented on certain matters. And, since the then method of reckoning the indicator as at 1 July in each of the years from 1989 to 1992 discounted the missing information, those matters were not decisive in applying the method. According to that method the new British and French information called for no change in the figures; so the original data were not "corrected" within the meaning of Article 13. If it is the choice of that method that the complainants are objecting to they should have appealed when it was applied so as to set the indicator for 1 July 1992. Since they failed to do so in time they have forfeited the right of appeal. Moreover, the former instances of application of article 13 may be distinguished.

6. Where the pay of international civil servants is adjusted to the cost of living or to pay in national civil services the Tribunal has in several judgments determined whether a revised method should apply retroactively to a period for which there had already been a final decision on adjustment. It has held that, even if the new method might make for nicer or fairer adjustment, the earlier decision must still stand. It is neither necessary nor reasonable to require retroactive application of the revised method: see Judgments 1457 (*in re* Di Palma and others), 1458 (*in re* Damond, Pautasso and Royles), 1459 (*in re* Hoebreck and others), 1460 (*in re* Derqué and others), 1603 (*in re* Bensoussan and others), 1604 (*in re* Damond No. 2 and others) and 1605 (*in re* Heitz No. 3). The Tribunal will follow those precedents, which rest on the precepts that a decision that has not been impugned in time holds good, and that relations between organisation and employee must be stable in law.

Here the EPO revised the method when it set the indicator as at 1 July 1993. It then took account of the French bonuses and British merit increments, whereas it had thitherto discounted them. So according to the old method the further information had no effect on the outcome and called for no "correction" of the indicator under Article 13. In other words, as is customary on review, Article 13 applies only where some error of fact is discovered, not where a mistake of law is alleged to have tainted the earlier decision. The complainants' case posits a mistake of law by the EPO in discounting the bonuses and merit increments. That is just what affords no grounds for review.

To be sure, the complainants are making the fairly plausible assumption that, had the Organisation known at the outset what the bonuses and increments amounted to, it would then have altered accordingly the method of reckoning the indicator, as indeed it did as from July 1993. But a plausible assumption cannot displace strict application of the rules. Else the stability of the Organisation's relations with its employees would be at risk in that commonsense decisions taken for want of full data might be belatedly challenged on the grounds that things had since become clearer in fact or even in law. Musing about what the Organisation might have done had it had fuller data is unreliable. The defendant says that one reason why it waived any increase due from counting of the bonuses and increments was that pay might otherwise have proved too high as against national civil services; so it might then have had to consider a revision, and that would have been awkward once the increase had gone through.

The complainants cite earlier cases in which the EPO did apply Article 13. But none of them is comparable: it never resorted to Article 13 to amend retroactively a rule of the adjustment procedure.

The conclusion is that the plea of breach of the article cannot be sustained.

7. If the complainants meant to challenge the indicator that came into effect on 1 July 1992 they should have impugned the first pay slips they got thereafter and thereby the indicator itself which — or so they argue — caused them injury by denying an increase in pay.

They made no such appeal in time.

They plead that only later did they discover how far the French bonuses and British increments went. May a staff member who discovers grounds for appeal after expiry of the time limit expect an extension of the time limit, or does the discovery set off a new one? Those questions are immaterial here.

In any event there could be a new time limit only if the staff member had been unable to act wittingly in time. Here the complainants had enough information to enable them to appeal in time since they knew all along that France and the United Kingdom paid their civil servants bonuses and increments that the EPO had discounted in working out the indicator. The staff could have lodged timely appeals and complaints.

The appeals and complaints are irreceivable on that score.

8. Lastly, the complainants plead breach of "parallelism" and of their rightful expectations.

Those pleas go to the decision to discount the British and French increments, viz. the setting of the indicator as at 1 July 1992. The principles they are relying on are irrelevant both to the construction of Article 13 and to the receivability of their belated appeals and complaints against that decision.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

WILLIAM DOUGLAS E. RAZAFINDRALAMBO EGLI

A.B. GARDNER

EIGHTY-THIRD SESSION

***In re* Palma** **Judgment 1665**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Francesco Palma against the European Organization for Nuclear Research (CERN) on 1 July 1996 and corrected on 1 October 1996, CERN's reply of 22 January 1997, the complainant's rejoinder of 22 February and the Organization's surrejoinder of 28 April 1997;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Under an agreement concluded in 1968 between the European Southern Observatory (ESO) and CERN as revised in 1983 and again in 1991, the staff of the ESO are participants in the Pension Fund of CERN.

The complainant, an Italian who was born in 1948, joined the staff of the ESO in September 1989. By a letter of 26 January 1995 the head of Personnel of the ESO told him that his contract, which was to expire at 31 August 1995, would not be renewed. In a memorandum of 6 June 1995 to the head of Administration he said that he had lost the sight of his left eye and wanted his case to go to the Rehabilitation Board. In its report of 14 July the Board assessed his loss of vision at 98 per cent and as corresponding to a degree of disability of 39 per cent. The Board took the view that though he had incurred such disability in the ESO's employ, it did not prevent him from performing his duties; he was to leave the Organization for other reasons. The Board recommended granting him a pension for "unsuitability" under Section 4 of Chapter II of the Rules of the CERN Pension Fund. The Pension Fund accordingly told him by a letter of

3 October 1995 that he would get a pension of 485 Swiss francs a month as from 1 September 1995.

The complainant appealed against that decision to the Governing Board of the Pension Fund on 30 November 1995 and supplied a brief on 13 December. He applied for the grant of an incapacity pension under Section 3 of Chapter II of the Fund's Rules. The Governing Board met on 18 April 1996 and decided to grant him under Article III 1.01 of the Rules, and as from 1 September 1995, *ex gratia* benefits equivalent to a 40 per cent partial incapacity. The monthly amount came to 2,141.50 Swiss francs in 1995. The Vice-Chairman of the Board so informed him by a letter of 7 May 1996, and that is the decision he is impugning.

B. The complainant contends that in determining the lawfulness of the Fund's decision the circumstances in which his appointment came to an end must be borne in mind. He says that since 1989 his work at the ESO had required him to spend time at a computer screen so that the myopia he had been suffering from since the age of 12 grew rapidly worse.

He says that in January 1994 his workload heavily increased and on 11 May 1994, while he was working at the screen, he felt a sudden pain in his left eye and suffered loss of sight which required him to seek emergency treatment. Only at the end of November 1994 did his own doctor give a sure diagnosis of permanent and serious incapacity and he says he so informed the Administration in December. On 17 January 1995 the ESO refused him an annual step increment. On 26 January it informed him without the slightest explanation that he was not to get the permanent appointment which he says was ordinarily granted to staff after six years' service, and his contract would not even be renewed.

He says that he was dismissed on account of a medically certified occupational disability. The doctor whom the Governing Board of the Fund consulted took the view that his "application for total incapacity is justified". So the material provision is not Article III 1.01 of the Fund's Rules, which is about *ex gratia* benefits, but Article II 3.02, which is about a pension for total incapacity.

The complainant seeks, among other things, the quashing of the impugned decision and asks that he be awarded a pension for total incapacity and all related benefits; that he be granted medical insurance coverage as from 1 September 1995; that all the case records be disclosed; and that he be awarded damages, including damages for loss of income up to the age of retirement; and 15,000 German marks in costs.

C. In its reply the Organization says that since the complainant is challenging a decision by the CERN Pension Fund it will not answer the complainant's pleas about his appointment with the ESO.

It says that he was not dismissed on account of any medically certified incapacity: his contract simply was not renewed. He therefore failed to qualify for an incapacity pension. The Pension Fund merely applied its own rules to his contractual situation, which is the concern of the ESO and of no other organisation. The Fund was entitled to grant him *ex gratia* benefits in accordance with Article III 1.01 of its Rules if it took the view that his case was "very exceptional".

The defendant further submits that the complainant's claim to orders against the ESO is irreceivable because his complaint is addressed to CERN. His claim to medical insurance coverage is irreceivable because it did not form part of his internal appeal. In any event he is a former official of the ESO and the question of his coverage has nothing to do with CERN.

D. In his rejoinder the complainant submits that CERN may not use the ESO's decisions as a pretext for rejecting his claims since by doing so it is preventing the Pension Fund from exercising its decision-making authority.

The letter of 26 January 1995, which gave notice of the non-renewal of his appointment and which served as the basis of the impugned decision, is unlawful because it did not follow the recommendation of the Contract Advisory Committee of the ESO, was not substantiated and failed to give the required notice of one year. CERN must therefore acknowledge that the complainant was dismissed in breach of due process.

He submits that the Pension Fund properly acknowledged his partial incapacity but was wrong to grant him the *ex gratia* benefits. Though seemingly generous, that decision has only made things worse. It deprives him of basic rights such as medical insurance cover, the right of his widow to a pension and his right to have any worsening of his health taken into account. The ESO rejected his claims on the grounds that only the Pension Fund was competent and by that time it was too late for him to challenge the ESO's decisions.

Lastly, he objects to CERN's plea that his claim to medical insurance coverage is irreceivable.

He alters his conclusions. He asks that CERN should let him have medical insurance coverage "by part of its Participating Organization" and under an agreement concluded with the ESO.

E. In its surrejoinder the Organization presses its pleas about the lawfulness of the impugned decision and explains that the amount of the benefits granted to the complainant may be changed if his health declines.

CONSIDERATIONS

1. The complainant, like other staff of the European Southern Observatory (ESO), is a participant in the Pension Fund of the European Organization for Nuclear Research (CERN). The Fund is part of the legal structure of CERN and has no independent legal status. Any appeal by an ESO staff member against a decision by the Fund is directed, not to the ESO, but to CERN.

2. The complainant was appointed to the ESO on 1 September 1989. His first contract, which was for three years, was followed by another, also for three years, up to 31 August 1995. By a memorandum dated 6 January 1995 the head of Personnel notified to him the withholding of an annual step increase as from 1 January and by a letter of 26 January gave him notice that his contract would not be extended beyond 31 August 1995.

3. On 11 May 1994, while working at a computer screen at ESO, the complainant had felt sudden pain in his left eye. He suffered loss of vision which in the following months became permanent. Dr. Tobias Neuhahn, an ophthalmologist practising in Munich, made a provisional report on him on 22 November 1994. On 9 December 1994 the complainant forwarded that report to the Administration of the ESO with a covering note referring to his "ascertained handicap". On 24 March 1995 Dr. Manfred Westhoff, another ophthalmologist of Munich, reported on his condition. On 6 June 1995 the complainant sent a memorandum to the head of Administration asking for the convening of the Rehabilitation Board and appending the provisional report by Dr. Neuhahn, the one by Dr. Westhoff and a final report dated 31 May 1995 by Dr. Neuhahn.

4. The Director General of the ESO accordingly convened the Rehabilitation Board, and it reported on 14 July 1995. It set at 39 per cent both the "degree of disability" and the loss of earning capacity - known as "unsuitability" - which the complainant had incurred while employed by the ESO. It concluded that his "condition cannot be classified as either occupational or professional". It held that he was "entitled to a pension for unsuitability" under Section 4 of Chapter II of the Rules of the Pension Fund of CERN. By a letter of 3 October 1995 the Pension Fund informed the

complainant that he would accordingly receive an "unsuitability pension" of 485 Swiss francs a month as from September 1995.

5. On 13 December 1995 the complainant addressed to the chairman of the Governing Board of the Fund an internal appeal against the "decision" of 3 October claiming an "incapacity pension" instead. Having heard him in March 1996, the Board changed the decision to award him the unsuitability pension. It decided on 18 April 1996 to grant him instead, under Article III 1.01 of the Rules, "ex gratia benefits equal to a partial incapacity pension of 40%, retroactive from 1 September 1995". The amount of those benefits came to 2,141.50 Swiss francs a month in 1995 and to 2,178.75 in 1996. The Vice-chairman of the Board so informed him in a letter dated 7 May 1996, which he got on 12 June. In a letter of 17 June he asked for an explanation of the reasons for the decision, and the Vice-chairman gave it in a letter of 4 July 1996.

6. The complainant is challenging the Board's decision notified in its Vice-chairman's letter of 7 May 1996. In the complaint form he asks that the Tribunal:

> "1. Quashes the CERN Pension Fund Governing Board (CPFGB) decision of 'ex gratia benefit equal to partial incapacity', granted to the complainant according to the Art.III.01 of the CERN Pension Fund (CERN-PF) Rules and Regulations ...;
>
> 2. Compels a new decision that clearly includes full legal, economical and financial applicability of the Chapter II Section I of the CERN-PF Rules and Regulations ...;
>
> 3. Orders to provide the complainant with a full health insurance since September 1, 1995 (date of his dismissal from ESO);
>
> 4. Orders the disclosure of any documentation concerning complainant's pension cases;
>
> 5. Orders a new decision that includes payment of a fair lump sum against all personal and moral injuries suffered by the complainant, inclusive his loss of earnings;
>
> 6. Awards the complainant DM 15,000 to cover his justifiable claim-expenses."

7. The complainant contends that he is entitled to an "incapacity pension" under Section 3 of Chapter II of the Fund's Rules. Article II 3.02 provides:

> "A member dismissed on grounds of medically confirmed incapacity shall be entitled to a total incapacity pension."

And Article II 3.03 says:

> "A member who has been reclassified as a result of medically confirmed partial incapacity and who, as a consequence has his reference salary reduced, shall be entitled to a partial incapacity pension."

8. According to the complainant's account he was suffering, when recruited by the ESO in 1989, from mere "common myopia" that was "innate" and "stabilised". Dr. Westhoff, whom he then consulted, diagnosed an operable eye ailment and certified him to be fit for work. After further examination Dr. Westhoff referred him in June 1994 to Dr. Neuhahn. In his provisional report of 22 November 1994 – referred to in 3 above – Dr. Neuhahn said:

> "It is certainly not working at the screen that caused your injury. Your myopia is innate. The bleeding in your left eye was more or less accidental and, as far as we can now tell, unforeseeable and so unpreventable ... Preventive measures are unknown ..."

The original reads:

> *"Die Bildschirmarbeit hat sicherlich nicht Ihre Krankheit verursacht. Ihre Kurzsuchtigkeit ist angeboren, die Blutung am linken Auge mehr oder weniger schicksalschaft unde - soweit wir dies heute wissen - nicht vorhersehbar und dadurch auch nicht vermeidbar ... sind vorbeugende Maßnahmen nicht bekannt ..."*

His conclusion was that the disability was probably irreparable.

9. The complainant sees the grant of *ex gratia* benefits as a pretext for the ESO's shirking its responsibility for "rehabilitation measures", i.e. keeping him on and guaranteeing proper medical treatment. He pleads a "clear legal presumption" that his is really a case of "'dismissal' following a medically ascertained and documented incapacity", whatever the ESO may have chosen to call it.

10. The letter that the head of Personnel of the ESO wrote to him on 26 January 1995 — referred to in 2 above — was explicit:

> "On behalf of the Director General I regret to have to inform you that on the basis of the recommendation by the Contract Advisory Committee, it has been decided not to offer you an indefinite contract. ... your actual contract will come to its natural end and will not be renewed or extended beyond 31 August 1995."

The complainant did not appeal against that decision. It is therefore no longer open to him to plead that he was dismissed because of his disability and that the letter was not what it purported to be, namely, notice of non-renewal. So any claim he founds on such a plea must fail.

11. Article II 3.02 applies where a staff member is "dismissed on grounds of medically confirmed incapacity", and Article II 3.03 where he has been "reclassified as a result of medically confirmed partial incapacity". Having been neither "dismissed" nor "reclassified" because of "medically confirmed incapacity", the complainant is not entitled to payment of an incapacity pension under either of those provisions.

12. By its letter of 3 October 1995, referred to in 4 above, the CERN Pension Fund informed the complainant that ESO had instructed it to pay him an unsuitability pension. The ESO's decision was taken on the strength of the Rehabilitation Board's conclusions, which recommended the grant of such a pension under Section 4 of Chapter II of the Rules of the Fund. Article II 4.01 provides:

> "Unsuitability is the reduction, presumed to be permanent or long-term, by at least ⅓ in earning capacity resulting from a deterioration in physical or mental health, which occurred while the person concerned held a contract with one of the participating Organizations."

Article II 4.04 reads:

> "Subject to the provisions of Article II 4.01 and Article II 4.02, a member shall be entitled to a pension for unsuitability upon leaving the employing organization for a reason other than resignation or dismissal owing to a disability confirmed by a medical certificate, or upon the occurrence of unsuitability the likelihood of which had been established in accordance with the provisions of Article II 4.02."

The Rehabilitation Board held that the unsuitability had been "incurred" while the complainant was under contract with the ESO. It was because he was to leave for a reason other than resignation or dismissal owing to a disability that the Rehabilitation Board concluded that he was entitled to a pension for unsuitability under Section 4.

13. By the impugned decision of 7 May 1996, however, the Governing Board awarded the complainant, instead of the unsuitability pension, "*ex gratia* benefits equivalent to a partial incapacity pension of 40%" which brought him a much higher income: 2,178.75 francs a month in 1996 as against only the 485 a month from the unsuitability pension.

14. The complainant's plea that the Governing Board of the Fund was not empowered to pay him the *ex gratia* benefit rests on his own interpretation of the provision under which it was acting. That provision was Article III 1.01, which reads:

> "When on the death of a member or of a recipient of an incapacity pension, no one is entitled to a survivor's pension, ex gratia benefits may be granted to the spouse, descendants, parents, brothers and sisters and grandparents, if they are in need and they were financially dependent on the deceased at the time of his death. The Governing Board, when it deems it necessary on account of the financial situation of the person concerned, may grant ex gratia benefits in these or other very exceptional cases and after consultation with the consulting actuary. The amount of such benefits shall be determined by the Governing Board. Should circumstances alter, the benefits may be increased, decreased or discontinued, according to the situation of the beneficiary."

The complainant submits that "ex gratia benefits" do not confer the same rights as does an "incapacity pension" but are intended mainly for what he calls "second line" heirs of a "pension beneficiary": they do not apply to someone, like himself, who is partly capable of work but was "dismissed", though "disabled".

15. CERN replies that the Governing Board may grant the *ex gratia* benefit in any "very exceptional" case, not just where the surviving dependants "of a member or of a recipient of an incapacity pension" are "in need".

16. CERN is right. The word "these" in the phrase "in these or other exceptional cases" in the second sentence of III 1.01 refers to financial dependants in need; so "other" must refer to cases outside that category which are "very exceptional". The Board therefore did have power to grant the *ex gratia* benefit to the complainant under the rule if, as it did, it came to the view, "after consultation with the consulting actuary", that his was a "very exceptional case". Besides, if his protest against the grant of *ex gratia* benefits were upheld he would have to fall back on the much lower unsuitability pension.

17. He argues further that by awarding him the *ex gratia* benefit the Board held him to be entitled to a partial incapacity pension. That is not so. The Board had already concluded, since he did not qualify under the Rules, that he was entitled to a pension neither for total nor for partial incapacity. It was prepared to grant him a pension for loss of earning capacity i.e. an "unsuitability pension"; but, having heard him, it decided as an exceptional measure to grant him instead *ex gratia* benefits equivalent to the "partial incapacity pension". Granting him the equivalent is not the same thing as actually awarding him such a pension.

18. The complainant's plea that the ESO did not provide him with any "rehabilitation measures" is immaterial to this case, which is about his

entitlement to a pension from the Pension Fund of CERN. The ESO is not the defendant in this case.

19. The first of his claims — set out in 6 above — fails because, as was said in 10 above, he may not contend that he was dismissed. That being so, there is no need to order disclosure of any documentation, and his fourth claim must fail too. His third claim, to the provision of full health insurance, did not form part of his internal appeal and is irreceivable under Article VII(1) of the Tribunal's Statute because he has failed to exhaust his internal remedies. In any event the social security protection offered by the CERN Pension Fund to staff members of the ESO does not provide for health insurance.

20. In his rejoinder the complainant "cancels" his second and fifth claims. The Tribunal therefore need not entertain them.

21. His sixth claim, to an award of costs, fails because his main claims fail.

22. In his rejoinder he also says that the Organisation is wrong to argue in its reply that the ESO was told of the loss of vision in his left eye four months after he had had notice of the decision not to renew his contract. In support of that contention he produces a note on a compliment slip dated 9 December 1994 addressed to the Administration of the ESO and sent with Dr. Neuhahn's provisional report of 22 November 1994. That point is, however, immaterial to this case. What the complainant has appealed against is not the ESO's decision not to renew his appointment but the decision by the Pension Fund of CERN to award him the *ex gratia* benefit.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

W. Douglas

WILLIAM DOUGLAS

Mella Carroll

MELLA CARROLL

E. RAZAFINDRALAMBO

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-THIRD SESSION

***In re* Bedrikow** **Judgment 1666**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Roberto Bedrikow against the International Labour Organization (ILO) on 10 May 1996 and corrected on 28 June, the ILO's reply of 6 August, the complainant's rejoinder of 10 September and the Organization's surrejoinder of 19 December 1996;

Considering Articles II, paragraph 1, and VII, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Brazilian citizen who was born in 1962, joined the International Labour Office in October 1989 under a short-term appointment which was renewed several times. He had already worked for the Office for three weeks in 1988. At the material time he was working for the Application of Standards Branch (APPL) at grade P.3.

An extension of appointment he got in July 1995 conferred on him the benefit of Rule 3.5 of the Rules governing conditions of service of short-term officials, known as the "Short-term Rules". According to 3.5 "the terms and conditions of a fixed-term appointment under the Staff Regulations" shall, with only a few exceptions, apply to staff who have been in the Organization's employ for at least one year without interruption. The offer of extension explained that the complainant would be paid repatriation allowance as from 1 August 1994. A covering letter said that the appointment was still short-term.

In a minute of 27 July 1995 the complainant claimed the status of a "non-local" holder of a fixed-term appointment. The Organization not having answered, he lodged an internal "complaint" with the Director-General on 13 December 1995. In a letter of 23 May 1996 the Director of the Personnel Department confirmed, at the Director-General's bidding, the implied rejection of his claim, and that is the impugned decision.

B. In support of his plea that he should be treated as a "non-local" staff member the complainant points out that he was granted the repatriation allowance as from 1 August 1994 and that under Article 11.15 of the Staff Regulations only staff who are not locally recruited qualify for it. He claims non-local status as from 1 August 1994 at the latest. But since the Organization arbitrarily interrupted his appointment at that date so as to dodge Rule 3.5, he believes that he is entitled to repatriation grant and so to non-local status as from 4 October 1993, the date of the termination of his last appointment before that interruption. He further argues that he should be treated as non-local as from 2 October 1989, because it is inconsistent to recruit someone as a "local" staff member in 1989 and later as a "non-local" one. The amount that the ILO owes him as from 1989 in subsistence allowances and travel costs totals 140,000 Swiss francs.

He pleads breach of equal treatment: all the other staff in his unit who were recruited non-locally got the proper benefits. In his case the Office acted dilatorily and in bad faith.

Since Rule 3.5 brought him under the Staff Regulations his appointment became "fixed-term and *sui generis*". The work he was doing was continuous. His claims are set out in detail in 3 below.

C. The Organization submits that the complaint is in part irreceivable because he failed to protest to the Director-General within the time limit in the Short-term Rules.

The personal information forms he filled up show that he had been living in Geneva since 1981 and received most of his university education there. He was resident in Geneva when he got his first appointment in 1988. He signed his second contract, in 1989, on his return to Geneva after a few months' stay in Brazil. He knew full well that the ILO was recruiting him locally since on 5 September 1989 it sent him a telex saying as much. It draws a distinction between "place of recruitment" and "home" and says that there is nothing inconsistent about paying the repatriation grant and conferring local status. It contends that his reckoning of the amounts due is "far-fetched".

He fails to show that the disagreement over how to construe Rule 3.5 caused him injury. So he has no cause of action. The sole purpose of 3.5 is to confer greater entitlements and safeguards by granting the staff member some of the benefits of a fixed-term appointment, albeit without changing the nature of the appointment. Whatever his duties may have been, the complainant still held just a short-term one.

D. The complainant maintains in his rejoinder that he was in Brazil throughout the year preceding recruitment in 1989 and that the ILO is wrong to rely on the personal information forms, which he filled up at least one year before recruitment. The Organization failed to explain just what sort of appointment it was offering.

E. Citing Judgment 1108 (*in re* Dahlqvist), the Organization contends that the complainant is bound by the terms of the contracts he signed and is too late to have them rewritten now.

CONSIDERATIONS

1. The complainant, a Brazilian citizen who was born on 21 October 1962 in São Paulo, lived for some years in Geneva, where his father was employed in an international organisation. He got a law degree at the University of Geneva in October 1986 and a diploma from the University of São Paulo in 1988.

On 7 April 1987 he filled up an ILO "personal information" form in which he expressed interest in working for the Office. He said that he had been living in Geneva since August 1981. The Office got the form on 13 July 1987.

From October 1988 to September 1989 he worked for a firm of lawyers in São Paulo.

The ILO gave him a short-term appointment from 1 to 20 June 1988 to cover the 75th Session of the International Labour Conference. His contract said that he was resident in Geneva.

He got a second short-term appointment from 8 to 24 June 1989 for the 76th Session of the Conference while on leave from the firm in São Paulo. That contract too gave Geneva as "place of residence".

On 2 August 1989 he wrote from São Paulo to the Personnel Department to say that he would like to work for the Office; he would be leaving Brazil in October, or earlier if need be, to go back to Geneva, where he had lived from 1981 to 1988.

On 28 August 1989 he wrote to the chief of the Application of Standards Branch (APPL) to accept an offer of a three-month appointment starting on 2 October 1989. He asked for "details of the type of appointment offered, and the terms and facilities, so that [he could] make arrangements, particularly for travel by air from São Paulo to Geneva".

The Office answered by a telex of 5 September 1989. It noted his acceptance of its offer; his appointment was to be a short-term one from 2 October to 22 or possibly 31 December; it would not be extended; and it would be subject to the Short-term Rules. The telex set out the pay and concluded with the words "Appointment under local recruitment rules".

On 20 September 1989 the ILO sent him at his address in Geneva a standard offer of appointment and he signed it on 2 October 1989. It set out the terms but the item "Travel expenses paid by the ILO" was left blank, the clear implication being that the Organization would not be paying his travel costs. There is no evidence to suggest any disagreement at the time on that score. The offer added that he would get the "post-adjustment" allowance which Rule 2.2(b) grants locally recruited staff.

Thereafter he was given several short appointments, ranging from two weeks to eight months, with breaks of from one to fifteen months, to meet the Office's needs for "seasonal" staff. The contracts always gave Geneva as his place of residence and he was always recruited as a local staff member and got the post adjustment.

From 4 October 1993 he was granted longer appointments as posts fell vacant. He was employed from 4 October 1993 to 4 March 1994, then from 5 March to 30 June 1994. After a break of one month he got an appointment from 1 August 1994 to 30 June 1995; then a last one from 1 July 1995 to 31 December 1995 at grade P.3, step 2.

Disagreement arose over the terms of his last appointment. He maintained, among other things, that he was not a local employee. He was in Brazil when he got from the ILO an offer of extension dated 19 July 1995. It said that he would still be subject to the Short-term Rules; as from 1 July 1995 Rule 3.5 would apply as from 1 August 1994; he was entitled to the pay of a fixed-term official and to repatriation grant; and the other terms and conditions held good. A fax letter of 19 July 1995 told him: "Local status remains unchanged". He answered at length in a minute of 27 July asserting that he had non-local status and that, having a fixed-term appointment, he came under the Staff Regulations, not the Short-term Rules. Having got no answer, he wrote on 1 August saying that he had no choice but to accept the offer as it stood though it was not what he wanted. He was later informed that he would get no further extensions.

2. On 13 December 1995 he lodged a "complaint" with the Director-General claiming, among other things:

> "(1) recognition that my current fixed-term appointment warrants applying the Staff Regulations, as Rule 3.5 of the Short-Term plainly requires;
> (2) recognition of the arbitrary interruption of my appointment in July 1994;
> (3) recognition of my non-local status;
> (4) retroactive payment of any entitlements refused because of the arbitrary application of the above-mentioned Rules and Staff Regulations;
> ...
> (9) subsidiarily, recognition that the Staff Regulations (fixed-term appointments) apply to me in full as I have been performing duties of a permanent nature since 2.10.89 despite excessive recourse to short-term appointments even though there were posts vacant in APPL."

A reply was sent to him on the Director-General's behalf on 23 May 1996. The gist of it was that all the contracts of appointment had been entered into by both parties. He did benefit from Rule 3.5, but he mentioned no entitlements thereunder that he had been denied. The grant of any other sort of benefits would require a formal exception to the Staff Regulations. His request concerning the break in contract in July 1994 was irreceivable because it was out of time. He had been "locally" recruited, and rightly so, since all the relevant documents gave Geneva as his place of residence; indeed in 1989 he had stated his intention of returning there even before the ILO had given him an appointment. So for that reason his claim to retroactive payment of entitlements showed no cause of action. And, as to his last claim, if what he wanted was a fixed-term appointment exempt from the Staff Regulations, that was out of the question.

3. On 13 December 1995, however, before getting the Director-General's answer, he had lodged this complaint against the implied rejection. He is claiming:

(1) express recognition of status as a non-locally recruited staff member;

(2) retroactive payment as from 2 October 1989 of all entitlements withheld in the absence of such recognition;

(3) failing (2), retroactive payment as from 4 October 1993;

(4) failing (3), retroactive payment as from 1 August 1994;

(5) recognition of the fixed-term nature of the appointment in force on 13 December 1995.

In sum he contends that the provisions whereby terms of appointment vary according as recruitment is local or non-local amount to binding rules. In his submission the ILO was wrong to refuse him non-local status since, as it well knew, he was living in São Paulo when it made him its first offer. He was, he says, "dismayed" to learn that others who were no better qualified but had been non-locally recruited were earning much more than he. At the time the Organization was remiss in telling him of his entitlements. It must pay them retroactively because the material rules are binding and because it applied Rule 3.5 retroactively to the last of his appointments. By letting him have repatriation grant it implied that he had not been locally recruited. It was arbitrary to go no further back than the starting date of his last contract — 1 August 1994 — because the one-month break in his appointment, in July 1994, had been quite arbitrary, the intention being to give him a continuous contract. So the date should have been 4 October 1993 at the latest. It should even go back to the start of the first appointment, in 1989, since he had of course been in Brazil when the ILO had then sought his services. It treated him worse than its non-locally recruited staff. By his reckoning it saved some 140,000 Swiss francs at his expense in unpaid per diem allowances and travel costs. His last contract was a fixed-term, not a short-term, one since the Organization granted him the benefit of Rule 3.5. He has, he says, an interest in the change of status as fixed-term staff may enter internal competitions and challenge non-renewal of appointment.

The Organization submits that his claims are irreceivable on two counts: they are out of time, and he has failed to exhaust the internal means of redress. If he meant to challenge its treatment of him he should have impugned its specific decisions within the time limit of sixty days in Rule 9.1 of the Short-term Rules. He did not do so. There is no need to determine whether his claims are time-barred under Rule 10.3 since they are in any case devoid of merit. According to the case law an organisation may agree with an employee to grant local or non-local status. Besides, there was ample reason to treat the complainant as a local recruit: he had lived in Geneva for years and in the autumn of 1989 he told the ILO that he would be going back to Geneva even before the contract was signed. He thereafter lived in Geneva and consistently said he lived there; so the Organization had no reason not to recruit him locally under later appointments. He was clearly informed at the material time of the terms of his appointment and the written contracts left no doubt as to what they were. If he objected, he should have done so at once. The ILO would — it goes on — scarcely have agreed to terms that entailed further costs. Letting him have the repatriation grant when he came under Rule 3.5 did not imply that he had non-local status: he is muddling "home" and "place of recruitment". In any case its recognition of his entitlement to the grant did not alter the terms of a contract both sides had agreed to. The defendant contends that, even supposing it was wrong to award him the grant, he may not derive from the mistake any further benefit he is not entitled to. His claim to recognition of his last appointment as a fixed-term one is irreceivable: it discloses no cause of action.

Receivability

4. (a) A claim to a ruling in law will be receivable only if the complainant shows some cause of action. Generally he may not do so if he may instead challenge a specific decision in support of his claim to redress. Thus a staff member who is challenging his pay may impugn the decision in his pay slip or a rejection of some specific claim he has made.

The complainant makes two claims — 1 and 5 — to rulings in law. Claim 1 is about the legal nature of his contract as it affects the place of recruitment. He seems to have made it only to lend substance to his claims — 2, 3 and 4 — to redress. It cannot stand on its own since it shows no cause of action that the complainant may have. If he believes that the ruling he seeks might serve in challenging some decision yet to come, he should wait until it does come. His claim 5 is about the legal nature of his contract as it affects duration. He argues that a ruling in law would serve in any future litigation, for example, as to just who may enter on internal competitions or challenge non-renewal. Here again he must await a decision that causes him actual injury.

(b) There is no need to determine whether his other claims are out of time: they are in any event devoid of merit.

The merits

5. (a) The material provisions of the Short-term Rules read:

> "Rule 3.2
>
> Local and non-local appointments
>
> A short-term official shall be classified at the time of his appointment as either locally or non-locally recruited. An official recruited inside the area of the duty station shall normally be classified as local.
>
> Rule 3.3
>
> Contract of employment
>
> (a) The terms of appointment of a short-term official shall be governed by a contract which shall consist of an offer of appointment, signed by the Director-General or his authorized representative, and a declaration of acceptance signed by the official.
>
> (b) The offer of appointment shall state -
>
> (1) that the appointment is subject to the provisions of these Rules;
>
> ...
>
> (3) the category, grade or position to which the official is appointed and the salary he will receive;
>
> (4) whether he is classified as locally or non-locally recruited;
>
> ...
>
> (d) A copy of these Rules and a declaration of acceptance to be signed by the official shall be transmitted together with the offer of appointment."

(b) Precedent has it that it is the contract concluded between the parties that determines whether the staff member's status is local or non-local. He must object to the terms before he signs. Thereafter it is too late to rewrite retroactively a duly concluded contract. Save when the staff member was mistaken, the place of residence cannot be an issue: see for example Judgments 613 (*in re* Fargaly); 1108 (*in re* Dahlqvist), 1189 (*in re* Pinto de Magalhaes No. 3) under 5; 1539 (*in re* Deakin) under 9, 11 and 12.

The complainant was and is bound by the terms of the contracts, which stated that he was locally recruited. The Tribunal is satisfied that he knew what local status meant: he had or could have got hold of the relevant part of the Rules and with his training as a lawyer must have grasped the meaning of the clause. So he was left under no misunderstanding, the less so since the execution of his first contract had made plain just what his rights were.

(c) The Rules allow the parties much freedom in determining by contract the sort of appointment they intend. That is why the second sentence of 3.2 states that only "normally" will 3.2 apply. Indeed the Organisation often has little to go on to determine what the place of residence is.

Yet here it had ample information on that score. The complainant had been living in Geneva for years and was still living there when it concluded the first contract. Even before he signed the third one he had told the ILO that he meant to go back to live in Geneva. Thereafter he said he was still living there.

6. His main plea is that the contract concluded in July 1995 let him have the repatriation grant and, since it is not given to someone with local status, the Organization must have appointed him non-locally from the outset.

(a) Article 11.15(a) of the Staff Regulations is headed "Repatriation grant". It says:

> "A repatriation grant shall be payable to any non-locally recruited official who on leaving the Organization otherwise than by transfer to the United Nations or a specialized agency or summary dismissal has completed one year of service outside the country of his home."

And Article 14.6 allows an exception only if it is not prejudicial to the interests of any other official or group of officials.

(b) It is true that the complainant did not reallly qualify for the grant under Article 11.15 since the Organization was treating him as a local recruit.

But he is wrong to deduce from that that he should not be treated as local. As the Organization contends, once Rule 3.5 applied to him it had to put him on a par with all other staff in the Professional category who were on fixed-term appointments. In their case no distinction is made as to the place of recruitment, they are all entitled to a repatriation grant, and so was the complainant. In other words, the term "any non-locally recruited official" in the rule is irrelevant to the case of such staff. That would hold good even if the complainant had got the grant by way of derogation from Article 11.15. In any event his getting it does not warrant his assuming an acknowledgement by the Organization that it had recruited him as a non-local staff member.

(c) Rule 3.5 is headed "Conditions of service upon extension of appointment". It provides:

> "(a) Whenever the appointment of a short-term official is extended by a period of less than one year so that his total continuous contractual service amounts to one year or more, the terms and conditions of a fixed-term appointment under the Staff Regulations of the ILO shall apply to him as from the effective date of the contract which creates one year or more of continuous service ...
>
> (c) For the purpose of this Rule, continuity of service shall not be considered to have been broken by any interruption which does not exceed 30 days."

In its offer of 19 July 1995 to extend his contract from 1 July to 31 December 1995 the Organization said:

> "As from 1 July 1995 Rule 3.5 ... will apply. So there will be the following amendments in your contract:
>
> entitlement to family allowance;
>
> retroactive award of step 2 in grade P.3 as from 1 August 1994;
>
> date of yearly increment: August 1995 (P.3/03);
>
> repatriation grant as from 1 August 1994.
>
> All the other terms of your appointment remain unchanged ..."

The complainant accepted that offer.

Nor may it be inferred from 3.5 and from the extension of his appointment that he was entitled to the retroactive grant of non-local status.

The effect of the rule is to bestow retroactively on a short-term official benefits granted to the holder of a fixed-term appointment. If, like the complainant, he belongs to the Progessional category the place of recruitment will have no bearing on the terms of his appointment. So neither does it have any bearing on entitlements granted retroactively.

Besides, the complainant does not argue that the rule affords the only grounds for his claims 2, 3 and 4. He agreed to the offer that gave him retroactively as from 1 August 1994 the higher pay and the repatriation grant.

The conclusion is that his pleas are devoid of merit.

7. He pleads discrimination on the grounds that others who were non-locally recruited were much better paid, though no better qualified. What he is asking for in substance is the same treatment.

The claim fails because he and the other staff members are not in like case: see Judgment 506 (*in re* Hoefnagels). The material distinction is that they concluded fundamentally different contracts with the ILO and that their contracts confer different rights, and the difference is not attributable to any decision that the Organization unilaterally took to discriminate.

The plea fails.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

MELLA CARROLL E. RAZAFINDRALAMBO EGLI

A.B. GARDNER

Registry's translation,
the French text alone
being authoritative.

EIGHTY-THIRD SESSION

***In re* Créchet (No. 2)** **Judgment 1667**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Patrick Georges Michel Créchet against the European Patent Organisation (EPO) on 6 May 1996, the EPO's reply of 20 August, the complainant's rejoinder of 14 October and the Organisation's surrejoinder of 15 November 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written evidence and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Frenchman, joined the staff of the European Patent Office, the secretariat of the EPO, in 1985. He was assigned to Directorate-General 1 (DG1) at The Hague as an assistant examiner at grade A1. The EPO promoted him to examiner at grade A2 as from 1 November 1986 and to A3 as from 1 November 1991.

On 18 August 1989 the President of the Office put to the Administrative Council of the EPO a paper, No. CA/47/89, about the policy of information on patents. The paper explained a scheme for assigning liaison officers to national industrial property offices.

On 13 May 1991 the Office published in the EPO *Gazette* an appeal for applications from staff in category A for a new post as liaison officer with the Portuguese National Industrial Property Institute (INPI) in Lisbon. The announcement said that the successful applicant would be seconded to the INPI for one year, which might be renewed, and that the experience gained would be seen as highly valuable both for him and for the EPO and the success of his secondment would be especially taken into account for the advancement of his career.

The complainant applied. By a letter of 5 March 1992 the Vice-President in charge of Directorate-General 4 told him that he had been appointed. He took up duty at the INPI on 1 May 1992. He had his appointment renewed several times.

In a letter dated 31 August 1995 he asked the Principal Director in charge of information on patents to consider promoting him in grade. In a letter of 5 October the Principal Director answered that his secondment would end at 31 December 1995 and that the promotion boards would "certainly take account" of the experience he had gained in Portugal. Also on 5 October, and in answer to his letter of 31 August, the Principal Director confirmed that his performance as liaison officer would be recorded in his staff report. On 22 November the complainant wrote a letter to the President of the Office citing CA/47/89 and the announcement in the *Gazette* and asking "what the special action guaranteeing the advancement of [his] career amounts to". In a letter of 12 December the Principal Director of Administration of DG1 answered on the President's behalf that his services as liaison officer would be recorded in his staff report. On 19 December 1995 he filed an internal appeal against that decision. At the EPO's request he explained in a memorandum of 19 February 1996 what he meant. He is impugning the implied rejection of his appeal.

On 1 January 1996 he was transferred to a post as an examiner in DG1, still at grade A3.

B. The complainant contends that the guarantees that the EPO offered for the advancement of his career induced him to apply for and to accept the post of liaison officer. CA/47/89 says in point 1.10 that such liaison officers would be expected to change posts after a fixed period. Point 5 of the announcement in the *Gazette*, which spoke of "career advancement", likewise referred to promotion within the meaning of the Service Regulations. The complainant says that the Organisation promised in talks with him in September 1991 about the meaning of point 5 to promote him by the end of the second year of his secondment to Portugal. The breach of that promise causes him injury since he is no further on than an examiner with only two years' experience, though he himself has eleven. The terms on which he holds his post in DG1 are tantamount to "*de facto* downgrading".

He believes that he has been discriminated against. Two other employees who served as liaison officers have had promotions; yet, through no fault of their own, they had more humdrum duties.

One of the reasons for the decision to transfer him to a lesser post was a wish to punish him for claiming guarantees of career advancement.

He asks the Tribunal to set aside "the decision by the President of the Office not to keep the promises made" and order the EPO to fulfil its "promises". He claims moral damages and costs.

C. In its reply the Organisation contends that the impugned decision causes the complainant no injury: its letter of 12 December 1995 did not refuse the information he had asked for. It nevertheless refrains from objecting to the receivability of his complaint.

In the defendant's submission there is no evidence of promises he says it made him about the advancement of his career. CA/47/89 says nothing of career advancement for liaison officers. Point 5 of the announcement in the *Gazette* does not provide for any derogation from the ordinary rules on promotion and career advancement for permanent employees. Nor does the complainant offer any evidence to suggest that he was made any promises in talks in September 1991. There was never any question of promoting him "by the end of the second year" of his secondment.

Putting him on an examiner's post at the same grade is no "downgrading". He offers no evidence to suggest that the others he mentions got unlawful advancement.

D. In his rejoinder the complainant explains that he is not challenging the promotions of the others in like case, but he maintains that he has been discriminated against.

E. The defendant observes in its surrejoinder that the complainant's getting promotion depends on the application of the ordinary rules. He cannot show any promise of preferential treatment and does not yet qualify for promotion to grade A4.

CONSIDERATIONS

1. The complainant, who is French and was born on 8 November 1957, is an engineer. The EPO recruited him on 1 May 1985 as an assistant examiner of patents at Directorate-General 1 (DG1) at The Hague. His

initial grade was A1. He was later promoted to A2 as an examiner and on 1 November 1991 to A3.

On 18 August 1989 the President of the Office put to the Administrative Council of the EPO a paper explaining a programme whereby it would assign liaison officers to any national industrial property offices which so wished. The liaison officers were to be employees who, by drawing on sound experience of information systems, could ensure that national offices made the most of the opportunities offered by the EPO. In return the Organisation would thoroughly understand what sort of information they needed. The officers were to change posts after their stint so as to encourage the flow of experience. For the purpose the EPO was to second examiners from DG1 or Directorate-General 2 for up to three years. The President's paper, CA/47/89, was circulated among the staff.

The EPO *Gazette* of 13 May 1991 published a lengthy notice of vacancy for a liaison officer in the Portuguese patent office (INPI). The notice said that the liaison officer would spend a year or more in Lisbon and there perform the duties listed. The secondment would start in October 1991. Salary would remain unchanged. Any further expenses the employee might incur would be met. The notice added in point 5 that the experience gained by the liaison officer during his mission would be seen as highly valuable both for him and for the EPO and the success of his secondment would be especially taken into account for the advancement of his career. Of several candidates the EPO appointed the complainant to serve as liaison officer in Portugal. By a letter of 5 March 1992 it told him that he was appointed for an initial, but renewable, period of one year. He had it extended to 31 December 1995, whereupon his secondment ended. At 1 January 1996 he returned to his post as an examiner, still at grade A3, at The Hague.

2. Before going back to The Hague he told his supervisors that he deserved promotion because of the large and useful contribution that he had made in Portugal.

In a letter of 31 August 1995 to the Principal Director for Patent Information he claimed in particular "consideration for promotion to a higher grade in accordance with the explanations given to him at the interview on Friday 13 September 1991 in Munich about point 5 of the announcement".

The Principal Director assured him in a letter of 5 October 1995 that the promotion boards would "certainly take account" of the experience he had gained while on secondment. The Principal Director further told him in another letter of 5 October:

> "I can confirm that your performance as liaison officer will be recorded in your staff report which, as you know, may affect the advancement of your career."

3. In a letter of 22 November 1995 to the President of the Office the complainant said:

> "I wish to remind you of the undertakings that the EPO entered into and to know what the special action guaranteeing the advancement of my career amounts to, since it induced me to apply for secondment to Lisbon as liaison officer."

He cited CA/47/89 and the announcement in the *Gazette*, said that his secondment had been a success and concluded:

> "Pending information from you about the content of the special action guaranteeing the advancement of my career ..."

The President's answer came in a letter of 12 December 1995:

> "The services you provided while on secondment will be reflected in your staff report, which of course will be taken into account for the advancement of your career."

By a letter of 19 December 1995 the complainant said that he was filing an internal appeal against what he saw as an "unfavourable decision".

He submitted a detailed statement of appeal on 19 February 1996, repeating his earlier arguments and contending that in the talks with him after he had applied for the post –

> "... in discussion on point 5 of the announcement in the *Gazette* the EPO expressly promised me special promotion on confirmation of my contribution to the success of the post, i.e. by the end of the second year of my secondment to the INPI in Portugal. In the same talks the EPO assured me that after my secondment to the INPI I would get a most promising post because of the great value of the experience gained both by me and by the Organisation."

He explained that his

> "internal appeal challenges ... the EPO's decision not to keep its promises and grant me promotion by the end of the second year and a promising post on the conclusion of my secondment to the INPI in Portugal."

Having got no answer, he has lodged this complaint impugning what he sees as the implied rejection of his claims. He puts forward the same main pleas as before.

4. The Organisation doubts whether the complaint is receivable. In its submission the complainant merely asked the President for information; the information he was given cannot affect his legal status, does not amount to a decision and therefore cannot cause injury.

But there is no need to rule on the issue since in any event the complaint fails on the merits for the reasons set out below.

5. The complainant relies on oral promises. The Organisation says that there were none. Since they are not proved, the sole material issue is whether he may rely on any written promise. There is therefore no need to say whether the Organisation would have been bound by any oral promise, not confirmed in writing and apparently granted without his supervisors' approval, when the appointment and promotion of EPO staff depend on strict compliance with written rules.

6. The EPO's written statements must be so construed as to bear the meaning that the parties must have intended.

The complainant is relying mainly on point 5 of the announcement in the *Gazette* of 13 May 1991.

(a) The issue is one of good faith. There is indeed no question of imputing to the EPO any promise to grant to a seconded employee who proved his mettle as liaison officer an automatic promotion in grade or appointment to some more covetable post. Such promise would have been untoward and presumably incompatible with any properly strict observance of the Service Regulations. So much was to be understood, and should have been understood, from the announcement.

(b) The reasonable construction to be put on the announcement is that success in liaison work should serve the advancement of the employee's career, first in the evaluation of his performance and then in assessing his qualifications for promotion or for appointment to some more desirable post. That is indeed what the text conveys and the interpretation is in line with the Service Regulations and with the Organisation's own interests.

The conclusion is that the text of the announcement gave the employee a limited assurance that a successful secondment as liaison officer would be taken into account as a point in his favour whenever a decision was to be taken on promotion or on appointment. But there was no direct promise as to what the decision would be: he was being given only an expectation.

(c) That is just the view that the President took, and the reply he gave the complainant is unexceptionable.

Only when a specific decision is taken on promotion or appointment may the complainant rely on the alleged success of his work as liaison officer.

The complainant's claims therefore fail.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

MELLA CARROLL E. RAZAFINDRALAMBO EGLI

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-THIRD SESSION

***In re* Bardi Cevallos**
(Application by UNESCO for review)

Judgment 1668

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 24 September 1996 for review of Judgment 1525, the reply of 14 October from Mr. Hugo Bardi Cevallos, the Organization's rejoinder of 19 November and the complainant's surrejoinder of 2 December 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. In Judgment 1525 of 11 July 1996 the Tribunal allowed a complaint from Mr. Bardi Cevallos. It set aside a decision by the Director-General of UNESCO and referred the complainant back to the Organization "for reconsideration of his right to renewal of appointment". The gist of its reasoning was that the decision not to renew his appointment showed a procedural flaw in that it had been taken before the Senior Personnel Advisory Board (SPAB) had expressed an opinion on his case. What was needed - held the Tribunal - was a new decision after the SPAB had expressed its views.

By this application the Organization is seeking review of that judgment on the grounds that are set out below.

2. As the Tribunal has often said, its judgments carry the authority of *res judicata* and only in quite exceptional circumstances will it review them. Several pleas for review are inadmissible, such as a mistake of law or misreading of the evidence. Other pleas may be admissible provided that

they are material to the Tribunal's ruling. They include the overlooking of some material fact, or a material error, i.e. a mistaken finding of fact which calls for no appraisal and which is to be distinguished on that score from a misreading of the evidence: see for example Judgments 442 (*in re* Villegas No. 4), 1309 (*in re* Ahmad No. 3) and 1353 (*in re* Louis No. 4).

3. The Organization's first plea is that the Tribunal committed a mistake of fact in Judgment 1525. It held that the procedure to be followed before the SPAB was governed by the Rules of Procedure of Personnel Advisory Boards in their version dated 20 November 1967, the one in force at the material time. The Organization points out that that version was repealed by circular 1751 of 16 January 1991. Only an excerpt of that circular was submitted to the Tribunal. A new version of the Rules came into force on 19 July 1995, i.e. at a date subsequent to the material facts.

(a) The Tribunal does not keep a full stock of the rules on the functioning of the Organization. At its session in May 1996 it wanted to consult the text of the Board's Rules of Procedure for the purpose of entertaining the defendant's objections as to the competence of that body. It therefore applied to the secretariat of the Organization for the text and was sent by fax the text of 19 July 1995. It then asked for the text of the Rules of 20 November 1967 in their English and French versions. The Organization did not, however, tell it of the date of repeal of the 1967 Rules or explain that for some time the procedure of the Board had not been governed by any written rules at all. Any mistake on that score in Judgment 1525 is attributable to the Organization's failure to provide full information.

In any event it is immaterial to the outcome.

(b) The complainant cited the Rules of Procedure in support of his contention that the Board was entitled thereunder to ask for and obtain certain information before giving its views.

Yet even in the absence of written Rules of Procedure the Board continued to function in accordance with unwritten rules that were akin both to those that had been in force earlier and to those that came in later. That is borne out by what the Organization says in its rejoinder about the reasons for the repeal of the old Rules and their eventual replacement by the new ones.

So any mistake of fact there may have been was irrelevant to the *ratio* of the judgment.

(c) The Organization objects to the statement in the judgment that it was common ground that the Rules of 20 November 1967 were the material provisions. It points out, quite rightly, that neither of the parties took up the issue.

As has been said, the Tribunal relied on the information supplied by UNESCO in holding that those Rules did apply. In the absence of comment from the parties it inferred that there were no objections to the relevance of those rules.

4. The Organization's second plea is that there was a mistaken conclusion under 3 that the Board was some sort of decision-making body that had to sort out staff problems, whereas in fact there is no such thing as co-management.

Since what the Organization is pleading is a mistake of law its plea is inadmissible. It is wrong anyway since the Tribunal did not hold that the Board was a decision-making body, but merely that it gave its opinion in the context of a procedure aimed at finding fair expedients.

5. Thirdly, the Organization argues that the Tribunal misconstrued Judgment 969 (*in re* Navarro). It interprets the passage in that judgment under 21 starting "As for the failure of the headquarters Board of Appeal to make any recommendation" to mean that the Director-General was free to take a decision without any recommendation from the Senior Personnel Advisory Board.

Here again the Organization is pleading a mistake of law, and that is not admissible.

But again the plea is devoid of merit anyway. The passage in question must be read in full and in context. Moreover, Judgment 1525 shows that the material issue was not the same in this case as in Navarro since here the lack of the prior opinion was due solely to the Administration's failure to let the Board have the information it had asked for.

6. UNESCO's fourth plea is that the Tribunal misread and misapplied Judgment 1289 (*in re* Enamoneta). It says that in this case, as in that one, the Personnel Advisory Board did express an opinion – namely that not enough had been done to look for another post – and so the Director-General was free to dispense with any formal recommendation, the Board having expressed its opinion.

Again, that goes to an issue of law and is an inadmissible plea. But again it is devoid of merit. Contrary to what UNESCO makes out, the SPAB was entitled to seek information on the possibilities of redeploying Mr. Bardi Cevallos and the Administration failed to answer, though the request was quite reasonable, the Board needing the information to make up its mind. The Board cannot properly be accused of meddling in the area of the Director-General's own competence.

7. The Organization's fifth and last plea is that the Tribunal should not have sent the complainant's case back "for reconsideration of his right to renewal of appointment". It maintains that a fixed-term appointment confers no "right" to renewal of an appointment.

That plea again goes to the law and is not one that the Tribunal will entertain. Besides, it is mistaken. The Tribunal did not say that the complainant had any right to renewal; it merely ordered the Organization to take a new decision on the issue in accordance with due process. The text of the judgment is quite clear on that score.

8. Mr. Bardi Cevallos has entered a counterclaim to payment by the Organization of interest at the rate of 10 per cent a year on the sums due in accordance with Judgment 1525 as from the date of notification of that judgment and until the date of notification of this one.

Such a counterclaim would be receivable in the context of an application for execution, which does not require prior exhaustion of any internal remedies: see Judgments 732 (*in re* Loroch No. 3) under 2 and 1328 (*in re* Bluske No. 3) under 17. But, apart from the award of costs, Judgment 1525 does not order the payment of any sums of money. There is therefore no call for any order imposing on the Organization the penalty of payment of interest: see Judgment 1117 (*in re* Massie and others).

The Organization must follow the procedure ordered in Judgment 1525 and take a new decision, whatever the financial consequences may be.

9. Mr. Bardi Cevallos engaged a lawyer to reply. He is entitled to the costs he seeks and the amount does not appear too high.

DECISION

For the above reasons,

1. The Organization's application is dismissed.
2. The counterclaim by Mr. Bardi Cevallos to payment of interest is dismissed.
3. The Organization shall pay him 5,000 French francs in costs.

In witness of this judgment Mr. Michel Gentot, Vice-President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

MICHEL GENTOT JULIO BARBERIS EGLI

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-THIRD SESSION

***In re* Meyers** **Judgment 1669**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Guy Armand Yves Paul Mutien Marie Meyers against the Customs Cooperation Council (CCC) on 22 April 1996 and corrected on 22 May, the CCC's reply of 11 August, the complainant's rejoinder of 11 September, the Council's surrejoinder of 21 October 1996 and its further observations of 4 April 1997;

Considering Article II, paragraphs 5 and 7, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Belgian who was born in 1931, is a former employee of the CCC, which he joined in 1972.

His health seems to have gone into decline after an operation for a slipped disc in 1993. He suffered temporary paralysis in 1994 and is still suffering after-effects. After three months off work in early 1993 he resumed duty half time in April and full time in May. After further sick leave starting on 24 January 1994 he went back to work in July but had to stop again on 8 August 1994. He got full pay until 28 February 1995.

The Council's insurance companies are Assurance Générale de France (AGF) and VITA, which are represented by a firm of brokers, Van Breda. At the insurers' insistence the complainant underwent examination by their doctor, who declared him wholly unfit for work. That finding entitled him to the grant of a permanent invalidity benefit equal to half pay as from 1 March 1995. By a letter of 31 March the head of the Council's administrative services told the complainant of his entitlements: an invalidity pension to be paid by the insurance companies, equal to half his pay from 1 March 1995; a terminal allowance reckoned up to 28 February 1995; and payment for the balance of annual and special paid leave. That letter did not reach him until 26 April.

On 9 May 1995 his counsel lodged a "complaint" on his behalf under Staff Regulation 26. In its report of 12 January 1996 the Appeals Board recommended allowing his claim to payment of a lump sum equal to three years' salary. But it held that "the main and indeed sole issue of the appeal turned on a dispute between appellant and insurance company" and that his other claims were devoid of merit.

By a letter of 19 January 1996 – the impugned decision – the Secretary General informed the complainant of his final decision. He noted that the Appeals Board agreed with him that the "claim to payment of a lump sum equal to three years' salary fell outside the Secretariat's competence" and he rejected the other claims as devoid of merit.

B. The complainant has two pleas.

The first is breach of Staff Rule 18.1(a) and (c)(i) in that his permanent total incapacity was overlooked. The Council refused to pay him the lump sum equal to three years' salary provided for in 18.1(c)(i); yet he can no longer carry on any normal sort of day-to-day life.

His second plea is breach of Staff Rules 14.1, 18.1(c), 18.4 and 18.10(a). The defendant overlooks the fact that at his age he was near the end of his career and so about to qualify for the benefits provided in Rules 14.1, 18.4 and 18.10(a). Since he was made to leave early he was entitled to compensation equal to the terminal allowance provided for in 18.4; to an indemnity for loss of employment equal to one month's pay for each year of service because the Council unilaterally ended his appointment; and to the "double pay" he would have got for his last three months' service had he been able, as he wanted, to finish his career.

He asks the Tribunal to quash the decision of 19 January 1996 and to order the Council to pay him a lump sum equal to three years' salary under the insurance policy; an indemnity for loss of employment equal to one month's pay for each year of service, or a total of 23 months; compensation equal to the terminal allowance he has lost because he was terminated early;

the "double pay" he would have got for his last three months of service had he worked until the age of 65; and costs.

C. In answer to his first plea the Council submits that the rules that the complainant cites are quite general provisions and that it is the actual terms of the insurance policy that determine just what staff are entitled to. He does not qualify under clause 16 of the policy to a lump sum equivalent to three years' salary. So say the insurance companies; and the dispute, if dispute there be, is therefore between him and the companies, the Council being only a third party. On that score his complaint is misconceived: it is irreceivable because the Tribunal lacks jurisdiction.

The Council's answer to his second plea is that the reason why his appointment ended was "not his reaching the age of retirement" but his permanent incapacity. "So there was no breach of Rule 14.1"*: it is immaterial. *A fortiori* he is not entitled to compensation in lieu of notice of termination on grounds of his reaching the age of retirement.

Contrary to what he maintains, he was not "made to leave"; his appointment ended because of his permanent incapacity. He therefore has no claim to "compensation equal to a terminal allowance". Entitlement to that allowance lapsed after 28 February 1995, when he left the Council's employ.

Lastly, he is not entitled to an indemnity for loss of employment since he was not terminated on any of the grounds set out in Rule 18.10(a).

D. In his rejoinder the complainant submits that the contract between the Council and Van Breda is a "contract to confer benefit on a third party", namely himself. So the Council cannot be a third party to the dispute between him and the insurance companies.

He submits that "the terms 'incapacity' and 'invalidity' are synonyms of disability" and maintains that the Council did act in breach of Rule 18.1(c)(i).

He contends that under Rule 12 the Secretary General may terminate an appointment only after referral to an advisory body. There was breach of due process. Moreover, in reckoning the amount of the complainant's terminal allowance the period of notice of termination was not, as Rule 12.1 requires, taken into account.

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* That Rule reads: "The appointment of an official shall terminate with effect from the first day of the month following that in which his sixty-fifth birthday occurs. Such termination shall entail the payment of an indemnity by virtue of Regulation 12(b) and (e) and Rule 12(c)".

Lastly, he is entitled to an indemnity for loss of employment because his post was abolished.

He seeks payment of interest at the rate of 8 per cent a year on all amounts due as from 1 March 1995.

E. In its surrejoinder the Council concedes that "incapacity" and "invalidity" are synonyms. But in its view that is not the point: although the complainant meets the first condition ("permanent incapacity assessed at two thirds or more"), he does not fulfil the second ("permanent total incapacity"). Rule 12 does not mean what he says and is in any case immaterial.

The notion of a "contract to confer benefit on a third party" is immaterial.

Lastly, his post was not abolished.

CONSIDERATIONS

1. The complainant, a Belgian who was born on 4 July 1931, joined the staff of the Customs Cooperation Council on 16 January 1972. When he left he held a grade B3 post in charge of supplies and his main duties were clerical.

In 1993 and again in 1994 he underwent surgery for a slipped disc. He spent time in hospital because of temporary paralysis of the left side. He suffered afterwards from speech impediments, loss of concentration, despondency and partial deafness in both ears.

Though sometimes on sick leave, he went on working until 8 August 1994. He was on full pay until 28 February 1995. Two companies, AGF and VITA, insured the Council's staff under a group policy. They appointed Dr. Vanderijst to examine him. The doctor's report of 28 February 1995 declared him to be suffering from total permanent occupational invalidity and from 50 per cent permanent functional invalidity. Neither the insurers nor the Council nor the complainant nor his own doctor challenged those findings.

In a letter of 31 March 1995, which he did not get until 26 April, the Council told him that he would be paid:

(a) a permanent invalidity pension equal to half of his salary, to be paid by the insurers as from 1 March 1995;

(b) a terminal allowance reckoned up to 28 February 1995;

(c) compensation for the balance of annual and special paid leave.

Appended to the letter were a breakdown of the terminal allowance, including the balance of leave, taking 28 February 1995 as the date of termination, or 8,542,730 Belgian francs, and a breakdown of the balance of leave, which accounted for 175,857 francs.

2. The complainant's counsel claimed over and above those amounts:

1. a lump-sum indemnity, equal to three years' pay, for permanent total invalidity, under Rule 18.1(c)(i);
2. an indemnity for loss of employment, equal to twenty-four months' pay later reduced to twenty-three months, corresponding to twenty-four years (or rather twenty-three) of service, under Rule 18.10(a), on the grounds that the organisation had terminated his appointment;
3. a terminal allowance equal to what he would have been paid had he left at the age of sixty-five, under Rule 18.4;
4. an indemnity equal to the three months' additional pay he would have got had he left at the age of sixty-five.

The Appeals Board held his first claim to be sound, but said it was a matter for the insurers. It held his other claims to be devoid of merit.

The Secretary General rejected his appeal by a decision of 19 January 1996 on the following grounds:

1. His claim under Rule 18.1 was of concern only to the insurers, not to the Council. Subsidiarily, the conditions set in the insurance policy were not met: his invalidity was not total within the meaning of that policy, his functional invalidity being only 50 per cent.
2. He did not qualify for the other sums he was claiming.

That is the decision he impugns.

3. In his complaint Mr. Meyers presses the same claims and pleas as before. In his rejoinder he adds that he ought to have been given notice of termination, that he should get full pay for the period of notice and that it should be taken into account in reckoning his terminal allowance.

The Council again replies that it may not entertain his claim to a further indemnity for total invalidity, that being a matter of concern only to the insurers. In its submission the insurance policy prescribes the payment of such indemnity only to a staff member who is suffering from total functional invalidity. The complainant is not. Nor is he entitled to an indemnity for loss of employment: his appointment was terminated on other grounds, namely invalidity, and besides, his post was not abolished. He may not claim payment of the terminal allowance due up to the age of sixty-five: the rules obviously preclude that. Nor is he entitled to the three months' double salary: it is due only when the staff member retires at sixty-five. As for his plea that the Council failed to give him notice, it argues that the rules he cites are immaterial. Like death, permanent total invalidity is a "fact" that frustrates fulfilment of the appointment; so there was no need for the Secretary General to terminate his appointment. Nor would there have been any point in giving him notice since he had no need of time to look for alternative employment.

The claim to an additional indemnity for total invalidity

4. Rule 18.1, which is about insurance, reads:

> "(a) Officials ... are entitled to certain benefits as described in general terms in the following paragraphs under insurance contracts entered into by the Council. Details of these contracts are set out in the Secretary General's Staff Instructions. This Rule does not confer any benefits beyond those provided by the contracts concerned.
>
> ...
>
> (c) Permanent incapacity
>
> (i). Resulting from natural causes. In the event of permanent incapacity assessed at two-thirds or more, a pension equal to half emoluments will be paid up to the age of sixty-five. ... In the event of permanent total incapacity, a lump sum equal to three years' emoluments will be paid in addition to the pension."

The Organization took out a group insurance policy for its staff with the insurance companies represented by Van Breda. Clause 16 of the policy says:

> "If an insured person suffers from total and permanent invalidity attributable to illness and is on that account unable to carry on any kind of occupational activity and is reliant on another person for assistance in carrying on normal day-to-day life, the insurers shall make him in advance the lump-sum payment that according to clause 12 is guaranteed in the event of death.

> Any declaration of invalidity shall be addressed to the insurers and accompanied by a certificate from the insured person's own doctor giving full particulars."

Clause 19 says in the first paragraph:

> "The degree of permanent incapacity of the insured person shall be ... determined by agreement between his own doctor and the doctor named by the insurers or, in the event of disagreement, by a third doctor freely chosen by the parties or, failing that, appointed on the nomination of whichever of the parties acts first."

5. The nub of the complainant's first plea is that Rule 18 directly conferred on him rights that the Council was bound to observe by securing adequate coverage from the insurers or, failing that, itself providing such coverage.

The plea does not fit the wording of Rule 18.1. According to that provision no benefits are conferred "beyond those provided" by the insurance policy. Although the Council has, arguably, itself the duty of insuring its staff, any such duty would be confined to the contingencies insured against since the text of 18.1 allows the Council much discretion in determining those contingencies.

Here the Council did not misuse its authority by concluding with the insurers the policy on insurance against permanent total invalidity. True, the definition of such invalidity in the policy is more detailed and seemingly narrower than the one in the Rules. But there is an objective reason for the narrowing of the definition. Someone who is suffering from occupational invalidity will be much worse off if he is also suffering from total functional invalidity that makes him dependent on others in day-to-day life. So additional compensation is only reasonable.

6. The complainant is asking the Council to get the insurers to abide by the terms of the policy. The Council's answer is that it may not do so, the insurers themselves being liable.

It is not clear from the text of the policy whether it is up to the Council, to the insured person or to both of them to put a claim to the insurers when the contingency occurs. Clause 1 of the policy says that it is subject to French law, namely the Insurance Contract Act of 13 July 1930, although there is an arbitration clause in 11(a) which says, in the third paragraph, that the arbitrator shall apply Belgian law or Belgian rules of international private law. Under the French Act — subject to special rules on life insurance in sections 56 to 83 — an insurance policy may, according to sections 6 and 9, be concluded for a third party. And in that event the policy allows the "beneficiary" to claim directly from the insurer.

The complainant was therefore free to put his claim directly to the insurance companies with which the Council had taken out the group sickness and accident insurance policy if he took the view that the terms of the policy were not being observed. Whether as a party to the policy the Council too was free to do so, and whether the complainant might have asked it to intercede on his behalf, are issues that need not be entertained.

As things stood, there was no reason for the Council to approach the insurers on the complainant's behalf. For one thing, he had not clearly asked it to; for another, it had no evidence at its disposal to suggest that the insurance policy had not been observed. According to the findings of the insurers' own medical expert — which the complainant did not challenge — he was not suffering from total permanent invalidity within the meaning of clause 16: his functional invalidity was only 50 per cent and there was no question of his needing constant attendance.

The conclusion is that the Council properly left it to the complainant to approach the insurers himself if he thought them liable.

7. That conclusion holds good also insofar as the complainant is contending that the Council is itself liable to its staff for benefits due under the policy.

8. The complainant objects to the Council's failure to bring in a third doctor to examine him.

The substantive conditions in the first paragraph of clause 19 of the policy were not met, however. There was no disagreement between the insurers' doctor and the complainant. Moreover, the complainant had not at once challenged the findings of the insurers' doctor.

That being so, there is no need to take up the plea.

Indemnity for loss of employment

9. Rule 18.10, headed "Indemnity for loss of employment", provides in (a) that such indemnity is to be paid to an official in the event of:

> "(i) suppression of his budget post;
> (ii) changes in the duties of his budget post ...
> (iii) general staff cuts, including those due to a reduction in or termination of the activities of the Council;

(iv) withdrawal of the Member of which the official is a national;

(v) transfer of the Headquarters of the Council or of any of its units to another country ...

(vi) refusal by the official ... to be permanently transferred to a country other than that in which he is serving."

The complainant submits that he qualifies under the rule for the indemnity, the Council having unilaterally terminated his appointment.

10.(a) He may not rely on any of the above-mentioned contingencies because on any literal construction Rule 18.10 does not apply to his case.

(b) If what he means is that there is a lacuna and that his own case is analogous to those the text mentions, then he is quite mistaken.

The indemnity for abolition of post is payable only where termination is attributable to some radical change of circumstances that is of the Council's own making and that it may impose on a staff member without his consent.

Termination of employment for invalidity, for which the staff member is not to blame, is not comparable since it is wholly attributable to his personal circumstances, not to the Council. Such termination is covered elsewhere in the Rules and there is another sort of protection for it. So leaving it out of the list in Rule 18.10 was assuredly intentional.

(c) The complainant says that after his appointment had been terminated his post was abolished and that he may therefore rely on Rule 18.10. The Council denies abolishing the post, the duties it carries being essential, and points out that it terminated his appointment on other grounds.

There is no proof of abolition.

The termination of his employment for invalidity was no pretext: he had indeed become an invalid, and he does not deny it. It was in the Council's interests to terminate someone who was no longer fit for duty.

The plea fails.

Indemnities granted from the age of sixty-five

11. Rule 14.1 reads:

"The appointment of an official shall terminate with effect from the first day of the month following that in which his sixty-fifth birthday occurs. Such

> termination shall entail the payment of an indemnity by virtue of Regulation 12(b) and (e) and Rule 12(c)."

The indemnity corresponds to the period of notice and is over and above salary.

A staff member who leaves at sixty-five, the age of retirement, is also entitled under Rule 18.4 to payment of a terminal allowance that takes account of full length of service with the Council.

12. The complainant claims those benefits. In his submission he should have got an indemnity equal to three months' pay and the full terminal allowance: the Council's unilateral termination of his appointment denied him those payments.

The Council cites the text of the provisions in support of its rejection of his claims.

13. As the complainant acknowledges, he did not strictly qualify since he stopped working before the age of sixty-five.

Nor is there any omission to be made good to his advantage. The early termination of an appointment for invalidity, a reason not attributable to the Council, is not comparable to retirement. Early termination is covered by particular rules that need no rectification by the Tribunal. The terminal allowance takes into account actual length of service and the text sets the method of reckoning it. Nor is such termination analogous to a case in which an organisation is liable in damages for injury to the staff member.

His claims are therefore without merit.

Pay for the period of notice and the effect of notice on the terminal allowance

14. In his rejoinder the complainant argues by the way that the Council should have given him notice of termination, that he was entitled to pay during the period of notice and that the length of that period should count in reckoning the terminal allowance.

In its surrejoinder and a supplement thereto the Council answers that Regulation 12 and Rule 12.1 do not apply; the Secretary General need not give notice of termination to a staff member unfit for work because of permanent invalidity; and, like death, such invalidity terminates the appointment *ipso facto*.

This claim is receivable because it falls within the ambit of the claims to financial compensation that he made in his internal appeal and that form part of his complaint, even though the grounds are different.

15. Regulation 12 says:

"(a) The Secretary General may, after consulting the appropriate advisory body, terminate the appointment of an official:

(i) If ... the official ... is unable to perform his duties;

...

(b) The termination of an appointment by the Secretary General shall be notified in writing to the official concerned, with a statement of the grounds for such termination and on a period of notice, according to grade and length of service.

...

(d) If an official is on sick leave at the time of the notification of the termination of his appointment, the period of notice provided for in accordance with paragraph (b) shall be increased by the number of days during which such official is actually on sick leave after the notification.

(e) Instead of giving the notice provided for in paragraph (b), the Secretary General may pay an official whose appointment is terminated the salary and allowances due for the period of notice."

Rule 12.1 says:

"(c) The period of notice provided for in Regulation 12(b) shall be:

- four months for an official of category A or L or of grade B6, B5 or B4, or C6;
- three months for an official of any other grade.

...

(e) The salary and allowances payable under Regulation 12(e) shall be:

(i) salary specified in Rule 16.2, subject to deduction of the official's contribution in respect of the Terminal Allowance as specified in Rule 18.4(b);

(ii) allowances specified in Regulation 16(d)(i), (ii), (iii), (v), (vi), (vii) and (viii).

The period of notice in respect of which salary and allowances are paid under Regulation 12(e) shall be taken into consideration in calculating the official's Terminal Allowance due to him under Rule 18.4(b)."

16. The Council's pleas in reply rest on the assumption that there are omissions in its written rules that need to be made good in that the rules on termination do not apply to permanent invalidity.

(a) The assumption is belied by the text of Regulation 12(a)(i), which requires that notice of termination be given to an official "unable to perform his duties". And according to 12(b) notice must be given in all the cases of termination set out in 12(a). The Regulation draws no distinction as to the cause or duration of incapacity.

As the Council says, when permanent incapacity is due to illness there is no question of applying 12(d), which extends the period of notice by the number of days of sick leave granted after notice has been given. Else the appointment could never be terminated at all. Yet that restriction on the application of 12(d) does not relieve the Council of compliance with the rules in 12(a) and (b) on termination and on notice in the event of permanent invalidity.

(b) There are no grounds for inferring any lacuna in those rules that the Tribunal need make good. The rules on termination of employment in the event of invalidity are so explicit and clear as to preclude imputing any oversight to the draughtsman. They also serve the purpose of enabling the staff member to prepare for the future. Indeed it is not a foregone conclusion that his unfitness for work with the Council will doom him to idleness. Regulation 12(e) acknowledges, by allowing the staff member to leave, that he may be unfit to serve the period of notice.

The Council's contention that permanent invalidity ends the appointment *ipso facto* also overlooks general precepts on the free exercise of consent.

Its plea therefore fails.

17. One principle of international civil service law is that a decision on a staff member's status may not work to his detriment before the date at which he had notice of it: see Judgment 1589 *(in re* de Assis) and the precedents therein. The grant of an invalidity pension does not empower the organisation to make the termination retroactive as from the date set for the start of payment and to disregard the requirement of notice in the rules (*ibidem*).

18. Here the Council failed to observe the rules. The complainant had notice of termination on 26 April 1995 and, since Regulation 12 expressly requires notice of termination for incapacity, it was from that date that the period prescribed in 12.1(c) should have run. The Council has afforded no just cause for withholding or reducing the complainant's pay in that period. Although 12(e) allows waiver of notice the staff member's financial interests

must still be observed. Of course the invalidity pension is not supposed to be a source of unjust enrichment. Until his appointment ends the staff member may expect no more than his pay. And it is plain from Rule 12.1 *in fine* that the terminal allowance should take account of the prescribed period of notice as set out above. There the Council erred: the document telling the complainant of his entitlement to terminal allowance takes 28 February 1995 as the date of termination.

Since his complaint succeeds on the two points, the Council must take a new decision in the light of this judgment.

19. The complainant further argues that the procedure was flawed because the Secretary General failed before terminating his appointment to consult the advisory body referred to in Regulation 12(a).

He does not deny, however, that his invalidity afforded grounds for termination, nor does he challenge the termination itself.

So he has no cause of action in claiming consultation of that body.

His plea therefore fails.

20. Since his complaint succeeds in part he is entitled to an award towards costs.

DECISION

For the above reasons,

1. The impugned decision of 19 January 1996 is set aside insofar as it took effect at 28 February 1995.
2. The case is sent back to the Council so that it may pay the complainant his entitlements in accordance with this judgment.
3. It shall pay him 100,000 Belgian francs in costs.
4. His other claims are dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

MELLA CARROLL E. RAZAFINDRALAMBO EGLI

A.B. GARDNER

Organisation internationale du Travail	International Labour Organization
Tribunal administratif	*Administrative Tribunal*

Registry's translation,
the French text alone
being authoritative.

EIGHTY-THIRD SESSION

***In re* Cottet** **Judgment 1670**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Françoise Cottet against the European Patent Organisation (EPO) on 14 June 1996 and corrected on 8 July, the EPO's reply of 2 October, the complainant's rejoinder of 7 November and the Organisation's surrejoinder of 13 December 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Directorate-General 2 (DG2) of the European Patent Office, the EPO's secretariat, is in Munich. Its main function is the substantive examination of applications for patents. At the material time the complainant, who is French, was an examiner in Munich at grade A2 and she had been since 1988.

On 16 March 1992 the Vice-President in charge of DG2 published a "Note to all examining staff concerning the reporting period 1992/1993". It explained what was meant by an examiner's "fair contribution" to production.

A note from the President of the Office to the chairman of the Promotion Board was published in the EPO *Gazette* of 18 July 1994. It set forth guidelines for drawing up lists of candidates for promotion in 1994 and said:

> "The Promotion Boards should be reminded that **merit** must be considered as the most determining factor in anyone's career and a 'record' can normally

> only refer to a performance during a period of time much longer than the period covered by the last report."

To qualify for promotion from A2 to A3 someone with a "good" rating of performance was required to have eight years' reckonable experience.

The complainant's performance reports for 1991, 1992 and 1993 gave her a "good" rating and she had a total of eight years' reckonable experience by 1 April 1994.

The list of promotions from A2 to A3 was posted up on 5 August 1994 and published in the *Gazette* of 12 September. The complainant's name was not on it. On 19 October 1994 she lodged an appeal with the President of the Office. On 3 August 1995 the Appeals Committee recommended allowing the appeal by sending the case back to the Promotion Board with instructions to draw up a complete list of those who qualified for promotion in 1994.

The Director of Staff Policy informed the complainant by a letter of 18 October 1995 that her case was to be sent back to the 1994 Promotion Board for that purpose. The Board drew up a new list and this time her name was on it. But the Director of Personnel Management informed her in a letter of 19 March 1996 that the President had decided that it would be premature to promote her to grade A3 in 1994. She challenges the decision on the merits. She says that it was taken on 18 December 1995 but she got notice of it only on 19 March 1996.

B. The complainant submits that she met the criteria for promotion published in the *Gazette* of 18 July 1994: the rating of her performance was "good" and she had eight years' experience. She argues that the Promotion Board based its evaluation of her case on the criterion of "fair contribution" was not one of the criteria for promotion published in the *Gazette* of 18 July 1994.

She asks the Tribunal to order her promotion to grade A3 as from 1 June 1994.

C. In its reply the Organisation asks the Tribunal to join the complaint with that of Mrs. Malika Weaver.

Citing the case law, it points out that the President has discretion in choosing the candidates to be promoted. It submits that promotion is not, as the complainant and the Appeals Committee believe, a foregone conclusion once the criteria set out in the note of 18 July 1994 are met. In his introduction to the note and in accordance with the Administrative Council's policy the President stressed the importance of merit. So there was every reason for examiners with eight years' experience and a "good" rating who did fulfil the criterion of "fair contribution" to be given precedence over those who had the same experience and rating but a lower output. "Fair contribution" is relevant only where a choice has to be made between candidates who meet the minimum conditions. So it is not a new requirement for promotion but an objective means of determining merit, which is an acknowledged criterion for promotion.

The "General Guidelines on Reporting", which were issued in February 1992 and are still valid, allow drawing up "special guidelines" for certain Directorates and types of functions.

D. In her rejoinder the complainant objects to joinder and presses her claims.

E. In its surrejoinder the Organisation presses its pleas. It points out that she was promoted to grade A3 from 1 April 1995.

CONSIDERATIONS

1. The complainant joined the staff of the European Patent Organisation (EPO) on 1 October 1988 as an examiner of patents at grade A2. She found that her name was not on the list of permanent employees promoted to grade A3 in 1994. In a letter which she wrote on 10 August 1994 to the Director of Personnel Administration she asked him to "explain the outcome of the meeting of the Promotion Board" for 1994. In a memorandum of 11 August in reply the Director set out the rules on promotion and said that her fulfilling the minimum qualifications did not guarantee promotion since it was not a foregone conclusion.

2. By a letter of 19 October 1994 the complainant filed an internal appeal with the President of the European Patent Office seeking promotion to grade A3 "as from the date by which she had a total of eight years' reckonable experience". She argued that she met the conditions for promotion to A3 that were set out "in the manual for examiners" and reproduced in the EPO *Gazette* No. 14/94 of 18 July 1994.

3. In a letter of 8 December 1994 the Director of Staff Policy told her that the President had referred her case to the Appeals Committee. The Organisation submitted its brief to the Committee on 30 May 1995. In its

report of 3 August 1995 the Committee recommended allowing the appeal and sending her case back to the Promotion Board with instructions to draw up a complete list of employees who qualified for promotion in 1994 and to forward that list to the President for a new decision on the promotion of the complainant to A3 in 1994. The Committee referred to the criterion of "fair contribution" as defined in a note signed by the Vice-President in charge of Directorate-General 2 (DG2) on 16 March 1992 and approved by the Local Advisory Committee. It took the view that that criterion was a further condition for promotion to A3 which had not been published in the *Gazette* of 18 July 1994.

4. In a letter of 18 October 1995 the Director of Staff Policy informed the complainant (a) that the President was of the opinion that "fair contribution" had not been treated as an additional condition for promotion to A3 and was only one "element" to be taken into account in assessing merit for promotion; and (b) that the President would instruct the Promotion Board for 1994 to complete the list of staff who qualified for promotion to A3 in that year. Once he had the complete list he would take a new decision on the complainant's promotion.

5. The Promotion Board drew up the complete list and put it to the President, who decided that it was premature to promote the complainant to A3 for 1994. The Director of Personnel Management so informed the complainant in a letter of 19 March 1996.

6. The complainant was promoted to A3 as from 1 April 1995.

The defendant's application for joinder

7. The defendant applies for joinder of this case with the complaint filed by Mrs. Malika Weaver on 18 June 1996 on the grounds that the conditions for joinder are met. Both complainants are examiners of patents and seek promotion to A3 as from 1994. They rest their claims on the same pleas, namely that they qualified for promotion and it was unlawful to make "fair contribution" a further condition.

8. It is true that the conditions for joinder set out in the case law are met: see Judgments 656 (*in re* Benussi and others), 657 (*in re* Metten and others) and 663 (*in re* Kern Nos. 2, 3, 4 and 5). But joinder is only an option, not an obligation, for the Tribunal. Since the complainant expresses opposition in her rejoinder to the proposal for joinder the Tribunal prefers to deal with the cases separately.

The impugned decision

9. What decision is being impugned? The parties differ. The complainant says in the complaint form that she is challenging a decision of "18.12.95" notified to her on "19.03.96", whereas the defendant says that the impugned decision is the one that was notified to her in its letter of 19 March 1996 and that, if her complaint were challenging the decision of 18 October or some other dated 18 December 1995, it would be irreceivable.

10. There being no text of any decision dated 18 December 1995 in the case records, there may be a mistake in the entry in the complaint form about the date of the impugned decision. But the complainant's claims are clear: she is objecting to the refusal of her claim to promotion to A3 as from 1994 and that decision is in the letter of 19 March 1996. The conclusion therefore is — *jura novit curia* — that that is the impugned decision.

The promotion of permanent employees

11. The procedure at the EPO for promoting permanent employees is in two stages.

12. At the first stage the Organisation lays down the conditions for promotion. It then has a full list drawn up of those who qualify. Any permanent employee who qualifies is entitled to be put on the list and the Organisation is bound to put him on the list. According to the rules that govern this stage of the procedure any staff member who believes that he qualifies may claim inclusion.

13. Here the complainant filed an internal appeal. In accordance with the Appeals Committee's recommendation the President sent her case back to the Promotion Board, and asked the Board to complete the list. Her name was then put on the list. That acknowledged by implication that "fair contribution" was not a further condition for promotion. As to the first stage the complainant therefore obtained full satisfaction.

14. At the second stage the Promotion Board puts the listed employees in order of merit and the President accordingly decides which of them are to be promoted. Promoting a staff member is at the President's discretion, and so his decision is subject only to limited judicial review. The Tribunal will set it aside only if it was taken without authority or in breach of a rule of form or of procedure, or if there was some mistake of fact or of law, or

if some material fact was overlooked, or if there was abuse of authority, or if a plainly wrong conclusion was drawn from the facts. Meeting the minimum conditions for promotion does not confer on the employee any right to such promotion at the second stage.

15. That is not how the complainant sees her position. In her letter of 19 October 1994 to the President of the Office she says:

> "The reason why I have not been promoted is not clear to me since I qualify for promotion from A2 to A3 ..."

And she presses the plea in her complaint:

> "I filed a provisional internal appeal on 19 October 1994 ... seeking promotion from A2 to A3 because I meet the conditions for promotion set out in Gazette No. 14/94 ..."

16. The plea fails because no staff member may assert any individual right to promotion. The President applied the criterion of "fair contribution" in putting the candidates in order of merit. That criterion, which relates to output, is only one of several that the President may apply and it does not appear unreasonable or absurd in itself. Since applying the criterion of "fair contribution" to determine the order of merit of candidates for promotion is a matter within the President's discretion his decision is not subject to review by the Tribunal save where there is one of the flaws set out in 14 above. Here there is none.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

WILLIAM DOUGLAS MICHEL GENTOT JULIO BARBERIS

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation, the French text alone being authoritative.

EIGHTY-THIRD SESSION

***In re* Weaver** **Judgment 1671**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Malika Weaver against the European Patent Organisation (EPO) on 14 June 1996 and corrected on 26 July, the EPO's reply of 24 October, the complainant's rejoinder of 28 November 1996 and the Organisation's surrejoinder of 24 January 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Directorate-General 2 (DG2) of the European Patent Office, the EPO's secretariat, is in Munich. Its main function is the substantive examination of patent applications. At the material time the complainant, who is French, was an examiner in Munich at grade A2 and she had been since 1989.

On 16 March 1992 the Vice-President in charge of DG2 published a "Note to all examining staff concerning the reporting period 1992/1993". It explained what was meant by an examiner's "fair contribution" to production.

A note from the President of the Office to the chairman of the Promotion Board was published in the EPO *Gazette* of 18 July 1994. It set forth guidelines for drawing up lists of candidates for promotion in 1994 and said:

> "The Promotion Boards should be reminded that merit must be considered as the most determining factor in anyone's career and a 'record' can normally only refer to a performance during a period of time much longer than the period covered by the last report."

To qualify for promotion from A2 to A3 someone with a "good" rating of performance was required to have eight years' reckonable experience.

The complainant's performance reports for 1991, 1992 and 1993 gave her a "good" rating and she had a total of eight years' reckonable experience by 1 December 1994.

The list of promotions from A2 to A3 was posted up on 5 August 1994 and published in the *Gazette* of 12 September. The complainant's name was not on it. On 11 October 1994 she lodged an appeal with the President of the Office. On 2 August 1995 the Appeals Committee recommended allowing the appeal by sending the case back to the Promotion Board with instructions to draw up a complete list of those who qualified for promotion in 1994.

The Director of Staff Policy informed the complainant by a letter of 18 October 1995 that her case was to be sent back to the 1994 Promotion Board for that purpose. The Board drew up a new list and this time her name was on it. But the Director of Personnel Management informed her in a letter of 19 March 1996 that the President had decided that it would be premature to promote her to grade A3 in 1994. She challenges the decision on the merits.

B. The complainant submits that she met the criteria for promotion published in the *Gazette* of 18 July 1994: the rating of her performance was "good" and she had eight years' experience.

The fact that the impugned decision mentions "a specific recommendation" in which the Promotion Board referred to the various aspects of her own case shows that the Board looked at her case in isolation and applied to it "unspecified criteria". She points out that in 1994 all A2 examiners were promoted if, like herself, they met in full the requirements for promotion and attained the level of "fair contribution" set by the Vice-President in charge of DG2 on 16 March 1992. The Organisation is therefore in breach of the *patere legem* rule, since "fair contribution" was not one of the criteria for promotion published in the *Gazette* of 18 July 1994.

She asserts that her ranking on the new list, which the Promotion Board was to draw up in order of merit, was not determined by comparison with the other A2 candidates. She asks the Tribunal to order the Organisation to disclose the text of the Promotion Board's "specific recommendation", to which the impugned decision refers, and, should the Organisation reject her arguments, hear witnesses who attended the Board's meeting. Lastly, she pleads discrimination on the grounds that DG2 examiners are required to fulfil an additional condition in order to qualify for promotion.

She asks the Tribunal to order her promotion to grade A3 as from 1 January 1994. She seeks an award of 2,500 German marks in costs.

C. In its reply the Organisation asks the Tribunal to join the complaint with that of Miss Françoise Cottet.

Citing the case law, it points out that the President has discretion in choosing the candidates to be promoted. It submits that promotion is not, as the complainant and the Appeals Committee believe, a foregone conclusion once the criteria set out in the note of 18 July 1994 are met. In his introduction to the note and in accordance with the Administrative Council's, policy the President stressed the importance of merit. So there was every reason for examiners with eight years' experience and a "good" rating who did fulfil the criteria of "fair contribution" to be given precedence over those who had the same experience and rating but lower output. "Fair contribution" is relevant only where a choice has to be made between candidates who meet the minimum conditions. So it is not a new requirement for promotion but an objective means of determining merit, which is an acknowledged criterion for promotion.

The "General Guidelines on Reporting", which were issued in February 1992 and are still valid, provide for the possibility of drawing up "special guidelines" for certain Directorates or types of function.

D. In her rejoinder the complainant submits that merit must be determined not according to just one criterion: it is the employee's performance in general that counts. The criterion of the "fair contribution" excludes all others including the quality of the work. The director of her unit urged his staff to concentrate on quality even if that meant failing to make the "fair contribution". To take account of fair contribution would be to reduce promotion to a mere "mathematical exercise", which in the Organisation's own view is wrong.

E. In its surrejoinder the Organisation contends that "fair contribution" affords the only means of assessing an examiner's output objectively. But failure to meet that criterion does not necessarily rule out promotions: compensatory factors may be taken into account. In the complainant's case, however, there were no such factors. So the Promotion Board was unable to recommend promoting her as from 1 December 1994, and it was on the same grounds that the President declined to promote her.

She was promoted to grade A3 anyway from 1 December 1995.

CONSIDERATIONS

1. The complainant joined the staff of the European Patent Organisation (EPO) on 1 February 1989 as an examiner of patents at grade A2. In EPO *Gazette* No. 17 of 12 September 1994 the Organisation published the list of permanent employees promoted to grade A3 in 1994. Having found that she was not on the list the complainant filed an internal appeal with the President of the Office on 11 October 1994 seeking promotion to A3 as from 1 January 1994. The Tribunal does not have the text of that appeal.

2. The President put the case to the Appeals Committee. In a report of 2 August 1995 the Committee recommended allowing the appeal and sending her case back to the Promotion Board with instructions to draw up a complete list of employees who qualified for promotion in 1994. The Committee took the view that only the conditions announced in EPO *Gazette* No. 14 of 18 July 1994 should determine whether a name went on the list, and that the Promotion Board should forward the list to the President for a new decision on the promotion of the complainant to A3 in 1994.

3. In a letter of 18 October 1995 the Director of Staff Policy told her that the President had endorsed the Committee's recommendation and that the list of candidates who qualified for promotion to A3 should include anyone who met the minimum requirements set out yearly in the *Gazette*. That, the Director said, was why the President had decided to send the matter back to the Promotion Board with instructions to make a complete list of candidates who qualified for promotion in 1994.

4. The Board drew up the list and put the candidates in order of merit. The President having decided that it was premature to promote the complainant to A3 for 1994, the Director of Personnel Management so informed the complainant in a letter of 19 March 1996.

5. The complainant was promoted to A3 as from 1 December 1995.

The purpose of her complaint

6. The complainant wants the Tribunal to order her promotion to grade A3 as from 1 January 1994. She also claims 2,500 German marks in costs. In the complaint form she gives her present grade as A3. So the only matter at issue is whether her promotion to A3 should be backdated to 1 January 1994.

The criterion of "fair contribution"

7. The complainant submits that because the Administration applied a new criterion of "fair contribution" which did not appear in the notice of promotion published in *Gazette* No. 14 the new requirement was unlawful. The EPO seeks to explain in its reply and surrejoinder that "fair contribution" is not a new requirement for promotion to A3 but a means of ranking candidates according to merit.

8. There is no need to rule on the relevance of the criterion of "fair contribution"; the President endorsed the Appeals Committee's recommendation and so had the Promotion Board draw up a complete list of candidates who met the conditions for promotion to A3 as set out in *Gazette* No. 14. He thereby implicitly acknowledged that "fair contribution" was not a new requirement for promotion to grade A3.

9. The Tribunal is satisfied on the evidence that the Organisation relied on "fair contribution" as a means of determining the relative merit of candidates for promotion, not as a prerequisite for promotion. According to consistent case law a decision not to promote an official is discretionary and subject only to limited review by the Tribunal, which will set it aside only if it was taken without authority, in breach of a rule of form or of procedure, or if there was a mistake of fact or of law, or if some essential fact was overlooked, or if there was abuse of authority, or if some clearly mistaken conclusion was drawn from the evidence.

10. The criterion of "fair contribution", which relates to output, is only one of several that the President may apply and it does not appear unreasonable or arbitrary when used for that purpose. Since applying the criterion of "fair contribution" to determine the order of merit of candidates for promotion is at the President's discretion the decision is not subject to review by the Tribunal save in the circumstances set out in 9 above. On that

score the Tribunal need only refer to its comments in Judgment 1670 (*in re* Cottet) also delivered this day.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

WILLIAM DOUGLAS MICHEL GENTOT JULIO BARBERIS

A.B. GARDNER

EIGHTY-THIRD SESSION

***In re* Kagermeier (Nos. 1 and 2)** **Judgment 1672**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Ingrid Maria Kagermeier against the European Patent Organisation (EPO) on 8 June 1995, the EPO's reply of 18 September, the complainant's rejoinder of 24 November 1995, the Organisation's surrejoinder of 14 February 1996 and further submissions of 25 October 1996, the complainant's observations of 14 February 1997 on those submissions and the EPO's brief of 21 March 1997;

Considering the application filed by Mr. Desmond Radford on 25 April 1997 to intervene in that complaint and the Organisation's observations thereon of 6 May 1997;

Considering the second complaint filed by Mrs. Kagermeier against the EPO on 9 June 1995, the Organisation's reply of 18 September, the complainant's rejoinder of 25 November 1995, the EPO's surrejoinder of 14 February 1996, the EPO's further submissions of 25 October 1996, the complainant's observations of 14 February 1997 on those submissions and the EPO's brief of 21 March 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a German, is an official of the European Patent Office, the secretariat of the EPO, at grade B3. At the material time she was employed in the Office's Receiving Section in Directorate-General 1 (DG1) at The Hague. She was also a member of the General Advisory Committee

(GAC) which under Article 38 of the Service Regulations, gives "a reasoned opinion" on questions submitted to it by the President of the Office on "any proposal which concerns the whole or part of the staff".

In November 1992 the EPO set up ten units, known as Search Assistance Services (SAS), as part of a plan to "decentralise" several departments at The Hague. Each SAS served three, four or five directorates in charge of "patent search". The new structure entailed changes in the working methods and so-called "working-place descriptions" of several hundred officials. The term "working-place description", a literal translation from the German "*Arbeits-platzbeschreibung*", is used interchangeably with "job specification".

The complainant learned from a note of 8 January 1993 which the Director in charge of "Finance/Personnel" addressed to "all SAS staff" that "new working-place descriptions" would "supplement" the job descriptions they already had.

By letters dated 27 January 1993 the complainant appealed to the President against the "decentralisation and diversification" of the Receiving Section and her new "working-place description". In her capacity as a member of the General Advisory Committee she asked the President in letters of 17 February 1993 to withdraw the new working-place descriptions on the grounds that the new system had "adverse consequences" for many staff at The Hague and was unlawful for want of prior consultation of the GAC.

The President referred her appeals to the Internal Appeals Committee and it submitted a single report dated 30 December 1994. The majority recommended allowing her claims to the withdrawal of her working-place description and to her reinstatement in the duties she had had before "diversification of tasks". But it unanimously recommended dismissing her claims to the abolition of the SAS and to a return to the old system.

In a letter of 13 March 1995, which she is impugning, the President rejected her internal appeals.

B. The complainant submits that the decentralisation of her section is unlawful. She alleges mistakes of law and the breach of her rights and of the general principles of the international civil service.

She pleads infringement of Article 38 of the Service Regulations under which she says the EPO has a duty to consult the GAC and the Local

Advisory Committee (LAC) on proposals which affect the whole or a part of the staff. Since the new working-place descriptions concern many staff in DG1 the President's failure to refer the matter to the committees ignored the requirement of consultation. In her second complaint she charges the Administration with preventing her from carrying out her duties as a member of the GAC.

Diversification of tasks, she submits, meant that officials' duties no longer had anything to do with their grade or post. The new system, which the Administration makes out to be provisional, offended against good faith and her right to a hearing. She says the EPO obscured her position in law by having her work in an environment that did not fit her job description. In breach of equal treatment the President consulted the General Advisory Committee on the working-place descriptions for staff in category A but not for staff in categories B and C; he also promised "special attention" for officials who accepted the new scheme.

She further objects to the composition of the Appeals Committee on the grounds of the partiality of one of its members.

In both complaints she asks the Tribunal to declare her working-place description unlawful and order a return to the old system. She claims (1) 10,000 guilders in moral damages for breach of "the rights to be heard or to be consulted of the General Advisory Committee and the subsequent discrimination"; (2) the same amount in moral damages for "lack of impartiality" in a member of the Appeals Committee; and (3) the same amount in costs. In her first complaint she claims the same amount in moral damages for "unlawful implementation of the decentralisation, diversification and introduction of the 'working place description' and the subsequent discrimination".

C. The EPO replies that the complaints are in part irreceivable. In her internal appeals the complainant made no claim to compensation on the grounds of failure to consult the GAC. It argues in its reply to her first complaint that in any event such failure did not infringe any right she might have as an employee; and it points out in reply to her second complaint that she pleaded no injury as a member of the GAC from the failure to consult it. Nor did she lodge an internal appeal against the system of decentralisation and diversification. So her claims to damages under those heads are irreceivable for failure to exhaust the internal remedies open to her.

Her objections to the new working-place description are irreceivable because she shows no cause of action. On 25 March 1993 she was transferred, as she had asked, to another unit and so was no longer working in an SAS.

On the merits the EPO submits that the system of decentralisation and diversification of duties, which it adopted in the exercise of its discretion is lawful. The "working-place descriptions" do not supersede the job descriptions which are provided for under Article 3(1) of the Service Regulations and which are still in force; nor are they either permanent or at odds with those job descriptions. They were provisional and intended to give the staff an idea of what duties members of an SAS might have in future; so the Administration was under no duty to submit them to any of the advisory committees.

The Appeals Committee itself rejected the complainant's objection that one of its members had a personal interest in the dispute.

D. In her rejoinders the complainant disputes the EPO's pleas on receivability and the merits. As to her first complaint she submits that it is plain from the list of duties in her staff report that the Organisation did apply the working-place descriptions: that caused her injury at the time and led her to ask for a transfer. On her other complaint she points out that by lodging an internal appeal as a member of the GAC she meant it to be understood that in her view the Administration had impaired her rights as such.

E. In its surrejoinder the EPO observes that there is no new argument in the rejoinder to make it change its position. The fact that a working-place description served as the basis for appraisal of performance does not make it final: it is only reasonable that duties should change according to needs. In any event, she was not "compelled" to carry out the duties in the working-place description.

F. In its further brief the Organisation says that the "draft final job descriptions" of the staff concerned by the process of decentralisation have been put to the General Advisory Committee, which has set up a working party to adopt a "reasoned opinion" within the meaning of Article 38(3) of the Service Regulations.

G. In her comments the complainant observes that the EPO's further consideration is incomplete in that it fails to reflect a "dispute" that rose at the Advisory Committee's meeting. She says that the administration presented its members with a *fait accompli* by providing the papers relating to the job specifications only a fortnight before the meeting — the minimum that the Service Regulations require — without any prior discussion between it and the staff representative or the working party. She submits that the President acknowledged at the meeting with the staff in January 1997 that it had been unlawful to bring in the job specifications in January 1993. She invites the Tribunal to hear evidence from the chairman of the Central Staff Committee.

H. In its final brief, the defendant explains that the new job specifications for staff in category B working for an SAS unit were brought in on 3 March 1997. It points out that since the purpose of the complaint is to challenge the lawfulness of the working-place that went out in 1993, there is no need to consider any further how the new descriptions came to be adopted or what they say.

CONSIDERATIONS

1. Article 3(1) of the EPO Service Regulations provides that the President of the Office "shall draw up specific job descriptions for each of the posts to which permanent employees may be appointed" and that on a proposal by the President the Administrative Council "shall determine the grade justified by each job description, taking into account the nature of the duties involved, the level of responsibility and the qualifications required".

2. The Administrative Council decided in 1983 to consolidate posts graded A1 to A4 in what the EPO calls the "Staff Plan". Also in 1983 it approved in accordance with Article 3(1) of the Service Regulations new "job descriptions", for which the terms in its other official languages were "*descriptions de fonctions*" and "*Stellenbeschreibungen*". They were set out in document CA/46/83. On the advice of the Advisory Group on Remuneration the Council decided in 1990 to take similar action for the B category of staff by having two B groups: grades B1 to B4 for "clerical officers" and B3 to B5 for "formalities officers". The Office communicated that decision to the staff in circular 200 on 22 February 1991 and none of the staff at The Hague lodged an internal appeal.

3. Technical innovations in the processing of data were greatly altering the duties to be performed by EPO staff and the means of

performing them. So the Organisation thought it necessary to carry out a thorough reorganisation of administrative services at Directorate-General 1 (DG1) that would make for the decentralisation and diversification of jobs. Part of the reorganisation consisted in setting up decentralised units known as Search Assistance Services (SAS) to render administrative services to several directorates. A pilot unit having been set up in 1991, the EPO decided in 1992 on the progressive decentralisation of DG1. By a note dated 17 July 1992 and headed "Decentralisation in The Hague" the Director of Personnel/Finance informed the staff of what was to be done.

4. On 28 October 1992 managers of the SAS units were appointed as from 1 November 1992. The administration was decentralised into ten such units, each serving three to five search directorates, the group consisting of the SAS unit and its search directorates being known as a "cluster".

5. As distinct from the term "job description" — "*description de fonctions*" and "*Stellenbeschreibung*" — in Article 3(1) of the Service Regulations a "job specification" — "*description de poste*" and "*Arbeitsplatzbeschreibung*" — denotes, according to the EPO, "the different duties involved in a specific post of a certain grade". It is drawn up "on the basis of precedents for each post". The term "working-place description", a literal translation from the German, is used interchangeably with "job specification": the Principal Director of Administration explained as much to the complainant in a letter dated 28 October 1993, which described it as "a detailed working-place description for each working place within the framework of ... job descriptions".

6. On 8 January 1993 the Director of Personnel/Finance sent to all SAS staff a note headed "New working place descriptions". Appended were such descriptions headed "B4/1 in a SAS-Team" and "B5/3 in a SAS-Team". A letter that the Administration wrote in German to SAS managers on 11 January 1993 described them as "draft working-place descriptions" ("*Skizzen der Arbeitsplatzbeschreibungen*"). They prompted two internal appeals from the complainant which have culminated in the present two complaints.

7. She lodged an appeal in letters dated 27 January 1993 to the President. She said that the working-place description introduced by the Administration's letter of 11 January did not correspond to her then job description and therefore "adversely affected" her. She contended that, in

breach of the Service Regulations, the President had omitted to consult the General Advisory Committee (GAC). She asked for a declaration that her "present job description is still in force" and that "the new working-place description is invalid" and to "cancel the introduction" of the working-place description.

8. She made another appeal in a letter dated 17 February 1993 to the President. She referred to the working-place descriptions introduced by the Administration's letter of 11 January and cited Articles 3 and 38 of the Service Regulations. She contended that "The introduction of the new working practice and method of work organisation, known as the 'cluster' system in combination with the 'working place description' has many serious and adverse consequences for a large number of the administrative staff in The Hague". The GAC — she went on — had not been asked for an opinion, contrary to the Service Regulations, and she asked the President to declare the letter of 11 January 1993 invalid. On 13 April 1993 she wrote a letter to the Director of Staff Policy referring to the new working-place descriptions in the letter of 11 January and to the note of 8 January from the Director of Personnel/Finance. She asked for a declaration in a staff circular that they were both invalid.

9. In her brief in support of her appeal of 27 January 1993 her claims were to:

> "- declaring the 'working-place description' illegal;
> - declaring the implementation of the 'working-place description' being the SAS system illegal;
> - the removal of the implementation of the diversification which is put into force by the cluster/SAS units;
> - the old situation as existed till November 1992 is put into force again."

In her brief on her appeal of 17 February 1993 she sought the same relief. She further contended that neither the GAC nor the Local Advisory Committee (LAC) had ever been consulted, that there was no reasoned opinion from them on the matter, and that the Committees' rights and so her own had been infringed. The main difference between her two appeals was that in the second she developed her contention that the failure to consult the GAC was in breach of Article 38(3).

10. The Appeals Committee joined the two cases and issued a single report on them on 30 December 1994. The Tribunal too joins the two

complaints since they deal with the same subject and arise out of the same set of circumstances and the same decision.

11. Some of the relief sought in the two complaints falls outside the scope of the relief sought in the internal appeals. The fourth claim that the complainant makes in her first complaint and the third claim in her second are akin to the relief that she sought in her internal appeals and that the Appeals Committee set out in the following terms:

> "(a) to declare the 'working-place description' illegal;
> (b) to declare the implementation thereof being the SAS system illegal;
> (c) to remove (annul) the implementation of the diversification of tasks in the cluster/SAS units;
> (d) to restore the situation as it existed before November 1992."

A complainant who fails to claim relief in an internal appeal may not do so in a complaint to the Tribunal because the internal means of redress will not, as Article VII(1) of the Tribunal's Statute requires, have been exhausted. So, apart from the relief that the complainant claims on account of the composition of the Appeals Committee, any relief she claims in her two complaints that goes beyond the relief she claimed in her internal appeals is irreceivable.

12. As to the relief that the complainant claims for the effect of the working-place description on her own position at work, she returned at her own request to her former unit as from 25 March 1993. From that date she was no longer working in an SAS unit and so was no longer affected by the "working-place description" she wants to have withdrawn. Moreover, the President's letter of 13 March 1995 — the decision she is impugning — states:

> "The job specifications which were dispatched in January 1993 are drafts of how future individual working places in a S.A.S. group were seen.
>
> Also, job specifications have to be clearly distinguished from the job descriptions indicated in Article 3, first paragraph, of the Service Regulations. The latter are subject of discussion in the General Advisory Committee and are submitted to the Administrative Council for approval of the corresponding grade. The idea behind the job specification is, however, to describe in more detail, and for every individual staff member, what duties are expected of him.
>
> As was stressed several times, the present job descriptions, approved by the Administrative Council in 1983, remain in force. As you have experienced yourself, you were at no time obliged to perform duties of another group of grades than your own. For the reasons set out above, the distribution of

> drafts of future job specifications served an informative purpose, and had no adverse effect on your administrative position, which is a condition for challenging a decision in a legal procedure. Since that condition has not been met, I have decided to reject the internal appeals."

The conclusion is that the relief claimed by the complainant under this head serves no purpose, and for two reasons. One is that she is no longer working in an SAS unit; and the other is that the President's written assurance that the drafts were merely informative and had "no adverse effect" on her administrative position gave her satisfaction.

13. There remains the issue of failure to consult the General Advisory Committee. The complainant's argument is that that failure constitutes an infringement of her own rights as a member of the Committee.

14. Article 38(3) of the Service Regulations reads:

> "The General Advisory Committee shall, in addition to the specific tasks given to it by the Service Regulations, be responsible for giving a reasoned opinion on:
>
> - any proposal to amend these Service Regulations or the Pension Scheme Regulations, any proposal to make implementing rules and, in general, except in cases of obvious urgency, any proposal which concerns the whole or part of the staff to whom these Service Regulations apply or the recipients of pensions;
> - any question of a general nature submitted to it by the President of the Office;
> - any question which the Staff Committee has asked to have examined and which is submitted to it by the President of the Office in accordance with the provisions of Article 36."

15. It is common ground that there was no consultation of the GAC before the Director of Personnel /Finance circulated the draft working-place descriptions with the note of 8 January 1993. The Organisation pleads that since those descriptions were provisional and sent merely for information, it had no obligation of submitting them to any advisory committee, be it local or general. It is true that in the Appeals Committee's report the majority rejected the Administration's contention that the new working-place descriptions were only provisional and that the staff could derive no rights from them. Yet the President's decision was explicit: it said that they merely served the purpose of information and had no adverse effect on the administrative status of the staff. That statement, which is binding on the Organisation, means that neither rights nor obligations flow from the draft

working-place descriptions. The EPO's position has therefore shifted since the Appeal Committee reported on the complainant's two appeals.

16. Article 38(3) requires a reasoned opinion from the General Advisory Committee on "any proposal which concerns the whole or part of the staff". As long as the preliminary drafts were not intended to have legal effect, the obligation of consulting the Committee did not arise. Only if the Organisation had decided to put those drafts into effect would it have had to consult the GAC before it might properly do so. In this instance it committed no breach of Article 38(3), and the plea fails.

17. On 25 October 1996 the Administration submitted to the GAC for an opinion what it referred to as "draft final job descriptions" for the purpose of decentralisation of staff in DG1. They comprised draft "job specifications" for grades B1, B2, B3 and B4 in one group and for grades B3, B4 and B5 in the other. The GAC discussed the job specifications at meetings it held on 28 and 29 November 1996 in Berlin. Since opinion was split its chairman asked both sides to submit their diverging views to the President within three working days. On 3 March 1997 the President announced his decision to put new job specifications into effect for DG1 staff in the B category who were members of SAS teams. Those specifications differ according to the grade and group that the employee belongs to and the duties outlined in them reflect the differing levels of duties and responsibilities laid down in the job descriptions in force since 1983. Thus the draft descriptions circulated on 8 January 1993, which were, as has been said, merely informative and had no legal effect, have been wholly superseded by the job specifications announced on 3 March 1997 and no longer have any relevance.

The Appeals Committee proceedings

18. Lastly, the complainant is asking the Tribunal to condemn the Organisation's failure to ensure impartiality in the composition of the Appeals Committee and to award her damages on that count. She accuses one of its members of being partial and criticises the two members who made up the minority for making misleading and false statements and infers that they too were not impartial and objective.

19. Article 111 of the Service Regulations reads:

> "The Chairman and members of the Appeals Committee and their alternates shall be completely independent in the execution of their task. In this respect they shall neither seek nor accept any instructions. If any one of them is

> required to take part in a case in which he might have a personal interest or in respect of which he participated in preparing the decision under appeal ... the Committee shall find, on being informed by the member concerned, or at the request of the appellant, or of its own motion, that the member concerned is unable to take part in that case."

20. The Committee itself rejected the complainant's request that it replace one of its members on the grounds that he was not impartial. It held that she had offered no new grounds in support and that in any case the conditions laid down in Article 111 of the Service Regulations for excluding a member were not fulfilled: the member she had named neither had any personal interest in the decision under appeal nor had taken any part in preparing it.

21. The Appeals Committee ruled on the complainant's objection to one of its members at the time of the hearings and in accordance with the rules, and she has not shown any reason why its ruling should be set aside. The plea fails.

The application to intervene

22. Since the first complaint fails, so too does Mr. Radford's application to intervene.

DECISION

For the above reasons,

The complaints, and the application to intervene in the first of them, are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

Wm Douglas

WILLIAM DOUGLAS

Mella Carroll

MELLA CARROLL

E. RAZAFINDRALAMBO

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-THIRD SESSION

In re Burghardt

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Gisela Marion Burghardt against the European Patent Organisation (EPO) on 14 June 1996 and corrected on 29 July, and the EPO's reply of 24 October 1996;

Considering that by a letter of 23 January 1997 the complainant informed the Registrar of the Tribunal that she wished to withdraw suit;

Considering that by a letter of 13 February 1997 the Organisation informed the Registrar that it had no objection to the withdrawal of suit;

Considering that suit is unreservedly withdrawn;

DECISION

The withdrawal of suit is hereby recorded.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

Wm Douglas

WILLIAM DOUGLAS

Mella Carroll

MELLA CARROLL

E. RAZAFINDRALAMBO

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-THIRD SESSION

In re Malhotra (Kashmiri Lal) (Nos. 7, 8 and 9)

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mr. Kashmiri Lal Malhotra against the World Health Organization (WHO) on 26 April 1996 and corrected on 14 May, the WHO's reply of 20 August, the complainant's rejoinder of 16 September and the Organization's surrejoinder of 18 December 1996;

Considering the eighth complaint filed by Mr. Malhotra against the WHO on 29 May 1996, the WHO's reply of 3 September, the complainant's rejoinder of 30 September 1996 and the Organization's surrejoinder of 6 January 1997;

Considering the ninth complaint filed by Mr. Malhotra against the same Organization on 25 June 1996, the WHO's reply of 30 September, the complainant's rejoinder of 31 October 1996 and the Organization's surrejoinder of 6 February 1997;

Considering that by a letter of 17 April 1997 the complainant informed the Registrar of the Tribunal that he wished to withdraw suit;

Considering the observations submitted by the WHO on 7 May 1997;

DECISION

The withdrawal of suit is hereby recorded.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

Wm Douglas

WILLIAM DOUGLAS

Mella Carroll

MELLA CARROLL

E. RAZAFINDRALAMBO

A.B. Gardner

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INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
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